No. 15-1391

Title:	Expressions Hair Design, et al., Petitioners v. Eric T. Schneiderman, Attorney General of New York, et al.
Docketed:	May 16, 2016
Linked with 15A1020	
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(13-4533, 13-4537)
Decision Date:	December 11, 2015
Rehearing Denied:	January 13, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Apr 1 2016	Application (15A1020) to extend the time to file a petition for a writ of certiorari from April 12, 2016 to May 12, 2016, submitted to Justice Ginsburg.
Apr 5 2016	Application (15A1020) granted by Justice Ginsburg extending the time to file until May 12, 2016.
May 12 2016	Petition for a writ of certiorari filed. (Response due June 15, 2016)
May 24 2016	Order extending time to file response to petition to and including August 1, 2016, for all respondents.
Jun 7 2016	Brief amicus curiae of Marion B. Brechner First Amendment Project filed.
Jun 15 2016	Brief amici curiae of Albertsons LLC, et al. filed.
Jun 15 2016	Brief amici curiae of Consumer Action, et al. filed.
Jun 15 2016	Brief amicus curiae of Cato Institute filed.
Jun 15 2016	Brief amici curiae of First Amendment Scholars filed.
Jun 15 2016	Brief amici curiae of Scholars of Behavioral Economics filed.
Aug 1 2016	Brief of respondent Eric T. Schneiderman, Attorney General of New York in opposition filed.
Aug 1 2016	Letter from counsel for respondents Cyrus Vance, District Attorney of New York County, and Ken P. Thompson, District Attorney of Kings County filed.
Aug 17 2016	DISTRIBUTED for Conference of September 26, 2016.
Aug 17 2016	Reply of petitioners Expressions Hair Design, et al. filed. (Distributed)
Sep 29 2016	Petition GRANTED.
Nov 14 2016	Joint appendix filed. (Statement of costs filed.)
Nov 14 2016	Brief of petitioners Expressions Hair Design, et al. filed.
Nov 17 2016	Brief amicus curiae of Institute for Justice filed.
Nov 21 2016	Brief amicus curiae of United States, in support of neither party filed.
Nov 21 2016	Brief amici curiae of The James Madison Institute, et al. filed.
Nov 21 2016	Brief amici curiae of Retail Litigation Center, et al. filed.
Nov 21 2016	Brief amici curiae of Cato Institute and Pacific Legal Foundation filed.
Nov 21 2016	Brief amici curiae of Consumer Action, et al. filed.
Nov 21 2016	Brief amici curiae of First Amendment Scholars and the First Amendment Lawyers Association filed.

Nov 21 2016	Brief amici curiae of Ahold U.S.A., Inc., et al. filed.
Nov 21 2016	Brief amicus curiae of CardX, LLC filed.
Nov 21 2016	Brief amicus curiae of United States Public Interest Research Group Education Fund, Inc. filed.
Nov 21 2016	Brief amici curiae of Scholars of Behavioral Economics filed.
Nov 21 2016	Brief amicus curiae of Alan S. Frankel filed.
Nov 21 2016	Brief amicus curiae of Professor Adam J. Levitin filed.
Dec 5 2016	SET FOR ARGUMENT on Tuesday, January 10, 2017.
Dec 7 2016	Record requested from the U.S.C.A. 2nd Circuit.
Dec 7 2016	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 9 2016	Record received from U.S.C.A. 2nd Circuit is electronic.
Dec 12 2016	CIRCULATED.
Dec 14 2016	Brief of respondent Eric T. Schneiderman, Attorney General of New York filed. (Distributed)
Dec 21 2016	Brief amici curiae of Labor, Environmental, and Civil Rights Organizations filed. (Distributed)
Dec 21 2016	Brief amici curiae of First Amendment Scholars filed. (Distributed)
Dec 21 2016	Brief amicus curiae of Credit Union National Association filed. (Distributed)
Dec 21 2016	Brief amici curiae of National Governors Association, et al. filed. (Distributed)
Dec 21 2016	Brief amici curiae of Action on Smoking and Health, et al. filed. (Distributed)
Dec 21 2016	Brief amici curiae of International Center for Law & Economics and Scholars of Law and Economics filed. (Distributed)
Dec 21 2016	Brief amici curiae of Florida, et al. filed. (Distributed)
Dec 21 2016	Brief amici curiae of Public Citizen, Inc., et al. filed. (Distributed)
Dec 21 2016	Brief amicus curiae of New York Credit Union Association filed. (Distributed)
Dec 21 2016	Brief amici curiae of Constitutional, Administrative, Contracts, and Health Law Scholars filed. (Distributed)
Dec 28 2016	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 3 2017	Reply of petitioners Expressions Hair Design, et al. filed. (Distributed)
Jan 10 2017	Argued. For petitioners: Deepak Gupta, Washington, D. C. For United States, as amicus curiae: Eric J. Feigin, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondents: Steven C. Wu, Deputy Solicitor General, New York, N. Y.
Mar 29 2017	Judgment VACATED and case REMANDED. Roberts, C. J., delivered the opinion of the Court, in which Kennedy, Thomas, Ginsburg, and Kagan, JJ., joined. Breyer, J., filed an opinion concurring in the judgment. Sotomayor, J., filed an opinion concurring in the judgment, in which Alito, J., joined.
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RECORD AND BRIEFS

15-1391

No. ____

MAY 12 2016
OFFICE OF THE CLERK

In the Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM, and DAVID ROSS,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; KENNETH P. THOMPSON, in his official capacity as District Attorney of Kings County,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 12, 2016

QUESTION PRESENTED

Ten states have enacted laws that allow merchants to charge higher prices to consumers who pay with a credit card instead of cash, but require the merchant to communicate that price difference as a cash "discount" and not as a credit-card "surcharge."

The question presented is:

Do these state no-surcharge laws unconstitutionally restrict speech conveying price information (as the Eleventh Circuit has held), or do they regulate economic conduct (as the Second and Fifth Circuits have held)?

CORPORATE DISCLOSURE STATEMENT

No publicly held corporation owns 10% or more of any petitioner's stock. Nor is any petitioner a subsidiary of any parent company.

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TABLE OF AUTHORITIES

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44 Liquormart, Inc. v. Rhode Island,
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Dana's Railroad Supply v. Attorney General, Florida,
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Dombrowski v. Pfister,
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First National Bank of Boston v. Bellotti,
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Hill v. Colorado,
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In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation,
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Italian Colors Restaurant v. Harris,
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People v. Fulvio,
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Procunier v. Martinez,
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Railroad Commission of Texas v. Pullman Co.,
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Ripplinger v. Collins,
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Rowell v. Pettijohn,
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Rubin v. Coors Brewing Co.,
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Thompson v. Western States Medical Center,
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Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
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Wolfson v. Brammer,
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Fla. Stat. § 501.0117 10

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Kan. Stat. Ann. § 16a-2-403 10

Mass. Gen. Laws Ann. ch. 140D, § 28A(a)(1)-(2) 10

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P.R. Code tit. 10, §§ 11, 12 10

Tex. Fin. Code § 339.001 10

Utah Code Ann. § 13-38a-202 10

Utah Code Ann. § 63I-1-213 10

Legislative materials

156 Cong. Rec. S4839 (June 10, 2010) 20

Cash Discount Act, 1981: Hearings on S. 414 Before the Senate Banking Comm., 97th Cong. (1981) 8, 9, 25

Pub. L. No. 93-495, 88 Stat. 1500 (1974) 7

Pub. L. No. 94-222, 90 Stat. 197 (1976) 8

Pub. L. No. 97-25, 95 Stat. 144 (1981) 9

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Other authorities

Ballard Spahr, *Fifth Circuit Rejects Constitutional Challenge to Texas "No Credit Card Surcharge" Law*, Consumer Financial Services Group (Mar. 10, 2016) 18

Jon Hanson & Douglas Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420 (1999) 6

David Hudson, *Federal appeals courts split over law on credit card surcharges*, ABA Journal (Mar. 1, 2016) 18

Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193 (1991).....6

Edmund Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217 (1990).....7

Carol Krucoff, *When Cash Pays Off*, Wash. Post, Sept. 22, 1981 9

Adam Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265 (2006).....6

Adam Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321 (2008).....5, 9, 25

Irvin Molotsky, *Extension of Credit Surcharge Ban*, N.Y. Times, Feb. 29, 1984, at D12 9

Note, *Free Speech After* Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981 (2016) 19

Scott Schuh, et al., Federal Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments?* (2010).....4, 21

Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behavior & Org. 39 (1980).....7

Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251 (1986) 7

Stuart Weiner & Julian Wright, *Interchange Fees in Various Countries: Developments and Determinants* (Fed. Reserve Bank, Working Paper 05-01, Sept. 6, 2005).....21

INTRODUCTION

Each time a consumer pays with a credit card, a merchant incurs a "swipe fee." These fees are typically passed on to all consumers through higher prices. But, if a merchant chooses, it may instead pass on the cost only to those customers who pay by credit card. It may do so by charging two prices: a higher price for those who pay with credit and a lower one for those who pay in cash.

All states allow such dual pricing. But ten states have enacted laws that seek to control how merchants may *communicate* the price difference to consumers. New York's law is illustrative: It allows merchants to offer "discounts" to those who pay in cash, but makes it a crime (punishable by up to one year in jail) to impose equivalent "surcharges" on those who pay by credit card.

A "surcharge" and a "discount" are just two ways of framing the same price information—like calling a glass half full instead of half empty. But consumers react very differently to the two labels, perceiving a surcharge as a penalty for using a credit card. Precisely because the surcharge label is more effective at communicating the true cost of credit cards and discouraging their use, the credit-card industry has long insisted that it be suppressed. No-surcharge laws in effect say to merchants: If you use dual pricing, you may tell your customers only that they are paying *less* to pay without credit (a "discount"), not that they are paying *more* to pay with credit (a "surcharge")—even though they *are* paying more for credit. Liability thus turns on the words used to describe identical conduct—nothing else.

Under these laws, a merchant who charges two different prices for a widget depending on how the customer pays (for example, $100 for cash and $102 for credit) may say that the widget costs $102 and that there is a $2 discount for paying in cash. But if the merchant instead

says that the widget costs $100 and there is a $2 surcharge for using credit to account for the swipe fee, the merchant has committed a crime.

The earliest reported prosecution of a state no-surcharge law targeted a New York gas station whose cashier made the mistake of truthfully telling a customer that it would cost "five cents extra" to pay with a credit card instead of saying that it would cost a "nickel less" to use cash. A court later vacated the conviction, however, because the law treats "precisely the same conduct . . . either as a criminal offense or as lawfully permissible behavior, depending only upon the *label* the individual affixes to his economic behavior." *People v. Fulvio*, 517 N.Y.S.2d 1008, 1011 (N.Y. Crim. Ct. 1987). "[I]t is not the *act* which is outlawed, but the *word* given that act." *Id.* at 1015. In recent years, New York has continued to target merchants for truthfully informing their customers that they impose a "surcharge" for credit, even giving scripts with specific language so merchants could reframe the same information as a cash "discount."

The question presented is whether such a law comports with the First Amendment. Judge Rakoff answered no, holding that New York's law regulates only "the manner in which price information is conveyed to buyers," which is "protected by the First Amendment," and fails to withstand the requisite scrutiny. App. 74a. The Second Circuit reversed, concluding that the law regulates "merely prices," not speech. App. 21a.

Not long after the Second Circuit's decision, the Eleventh Circuit reached the opposite conclusion. It held that Florida's virtually identical law—under which a merchant may "offer a discount for cash," but "calling the same price difference a surcharge" could land the merchant in jail—"targets expression alone," and cannot survive scrutiny. *Dana's R.R. Supply v. Attorney Gen.*,

Fla., 807 F.3d 1235, 1239, 1245 (11th Cir. 2015). In so holding, the Eleventh Circuit joined Judge Rakoff and a California district court (which struck down that state's law as unconstitutional), setting up a "direct conflict" in the circuits. *Id.* at 1257 (Carnes, C.J., dissenting).

That conflict has only grown. More recently, a divided Fifth Circuit panel acknowledged the "circuit split" and upheld Texas's no-surcharge law. *Rowell v. Pettijohn*, 816 F.3d 73, 78 (5th Cir. 2016). The majority found the Second Circuit's reasoning "persuasive"—and the Eleventh Circuit's "unavailing"—and concluded that the law "regulates conduct, not speech." *Id.* at 80, 83.

A square split on such a fundamental constitutional question is reason enough to grant certiorari. But the conflict here is particularly undesirable because merchants need one clear answer to a question that affects the nation's economy: how they may present their prices to consumers. And until they get an answer, many merchants will refrain from dual pricing altogether, even though it is legal, because they cannot convey the cost of credit how they would like—as a credit-card surcharge.

The decision below also cannot be reconciled with this Court's precedent. A law that makes liability turn on how a merchant conveys truthful "price information" to consumers regulates speech, and must satisfy First Amendment scrutiny. *Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Because this law "crumbles under any level" of scrutiny, *Dana's R.R. Supply*, 807 F.3d at 1239, the Court should grant certiorari and reverse.

OPINIONS BELOW

The Second Circuit's amended opinion is reported at 808 F.3d 118 and reproduced at 1a. The district court's decision is reported at 975 F. Supp. 2d 430 and reproduced at 55a.

JURISDICTION

The court of appeals entered judgment on September 29, 2015. App. 46a. On January 13, 2016, the court of appeals denied a timely petition for rehearing en banc. App. 88a. On April 5, 2016, Justice Ginsburg granted an extension of the time to file a petition for certiorari until May 12, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." New York's no-surcharge law provides: "No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means. Any seller who violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or a term of imprisonment up to one year, or both." N.Y. Gen. Bus. Law § 518.

STATEMENT

"What most consumers do not know is that their decision to pay by credit card involves merchant fees, retail price increases, a nontrivial transfer of income from cash to card payers, and consequently a transfer from low-income to high-income consumers." Schuh, et al., Federal Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments?* 1 (2010). A prime reason for this is that the cost of credit has been kept hidden from consumers: Although merchants may charge consumers more for using a credit card, they cannot effec-

tively communicate that added cost because the credit-card companies have succeeded in insisting that any price difference be framed as a cash discount, rather than a credit-card surcharge.

This industry-friendly speech code has long been imposed through both private contract and state legislation. But a nationwide settlement in an antitrust class action required the credit-card companies to remove their contractual no-surcharge rules in early 2013. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013). So state laws like New York's have now assumed sudden importance: They are the only thing stopping merchants from truthfully saying that they impose a credit-card "surcharge" because credit costs more.

New York's no-surcharge law makes it a crime, punishable by a $500 fine and up to one year in prison, for any "seller in any sales transaction [to] impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. The law does not, however, outlaw dual pricing; "it permits offering cash customers a discount" if so expressed. App. 14a.

I. Why labels matter: the communicative difference between "surcharges" and "discounts"

A credit-card "surcharge" and a cash "discount" are just "different frames for presenting the same price information—a price difference between two things." Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1351 (2008). They are equal in every way except one: the label that the merchant uses to communicate that difference.

But labels matter. "[T]he frame within which information is presented can significantly alter one's perception of that information, especially when one can per-

ceive the information as a gain or a loss." Hanson & Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420, 1441 (1999). This difference in perception occurs because of people's tendency to let "changes that make things worse (losses) loom larger than improvements or gains" of an equivalent amount. Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991).

"Consumers react very differently to surcharges and discounts." Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 280 (2006). Consumers are more likely to respond to surcharges (which are perceived as *losses* for using credit) than to discounts (which are perceived as *gains* for not using credit). *Id.* Research shows just how wide this gap is. In one study, 74% of consumers responded negatively to surcharges, but fewer than half responded negatively to equivalent cash discounts. *Id.* at 280-81.

The effectiveness of surcharges is why the petitioners here seek to impose them. Surcharges inform consumers of the cost of credit and thus create meaningful competition, which in turn drives down that cost. If swipe fees are too high, consumers will use a different payment method, and banks and credit-card companies will have to lower their fees to attract more business.

II. The credit-card industry's efforts to prevent merchants from communicating the costs of credit as "surcharges"

The invisibility of swipe fees is no accident. It is the product of concerted efforts by the credit-card industry over many decades. Over the years, the industry has succeeded, both through contractual provisions and

legislation, in silencing merchants' attempts to call consumers' attention to the true costs of credit.

A. The industry's early ban on dual pricing and Congress's protection of cash "discounts"

In the early days of credit cards, credit-card companies banned any attempt at differential pricing between credit and cash by specific clauses in their contracts with merchants. Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217, 219-20 (1990). But in 1974, Congress enacted legislation granting merchants a non-waivable right to "offer[] a discount" to induce consumers "to pay by cash, check, or similar means" other than a credit card. Pub. L. No. 93-495, 88 Stat. 1500 (1974) (codified at 15 U.S.C. § 1666f(a)).

B. The credit-card industry shifts its strategy to labels

Consumer advocates initially considered the 1974 legislation a victory. But the credit-card industry, seizing on Congress's use of the word "discount," and the arguable ambiguity over whether the law allowed surcharges, soon shifted its focus to the way merchants could *communicate* credit pricing to consumers. Aware that how information is presented to consumers can have a huge impact on their behavior—and that many merchants would avoid dual pricing if surcharges were outlawed—the credit-card lobby "insist[ed] that any price difference between cash and credit purchases should be labeled a cash discount rather than a credit card surcharge." Tversky & Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251, S261 (1986); *see also* Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behavior & Org. 39, 45 (1980) ("[T]he credit card lobby turned its attention to form rather than substance. Specifically, it preferred that any difference

between cash and credit card customers take the form of a cash discount rather than a credit card surcharge.").

C. The industry's labeling strategy achieves short-lived success at the federal level

For a while, this lobbying paid off. In 1976, Congress passed a temporary ban on "surcharges," despite the authorization for "discounts." Pub. L. No. 94-222, 90 Stat. 197. But by the early 1980s, opposition to the ban grew as the Reagan Administration, consumer groups, and retailers all urged Congress to let it lapse.

Both opponents and supporters of the ban recognized that it hinged on semantics. A member of the Federal Reserve Board, which unanimously opposed the ban, testified about "the obvious difficulty in drawing a clear economic distinction between a permitted discount and a prohibited surcharge." *Cash Discount Act, 1981: Hearings on S. 414 Before the Senate Banking Comm.*, 97th Cong. 9 (1981). "If you just change the wording a little bit, one becomes the other." *Id.* at 22. The Board thus proposed "a very simple rule": that both surcharges and discounts be allowed and "the availability of the discount or surcharge be disclosed to consumers." *Id.* at 10.

Every major consumer-advocacy group agreed. One advocate testified that the difference between surcharges and discounts "is merely one of semantics, and not of substance." *Id.* at 98. But "the semantic differences are significant," she explained, because "the term 'surcharge' makes credit card customers particularly aware that they are paying an extra charge," whereas "the discount system suggests that consumers are getting a bargain, and downplays the truth." *Id.* The cost of credit is thus best "expressed in the form of [a] surcharge." *Id.* Another advocate put it more pithily: "one person's cash discount may be another person's surcharge." *Id.* at 90. "Removing the ban on surcharges," he said, "is an im-

portant first step" to "disclos[ing] to consumers the full" cost of credit so they can "make informed judgments." *Id.* at 92. President Reagan's Federal Trade Commission chairman also opposed the ban, saying that "a discount and a surcharge are equivalent concepts." *Id.* at 127.

By contrast, American Express and MasterCard "strongly" supported the ban, even though they too understood that, from a "mathematical viewpoint," "there is really no difference between a discount for cash and a surcharge for credit card use." *Id.* at 43, 55. And the big banks likewise supported treating "surcharges" and "discounts" differently because a surcharge "makes a negative statement about the card to the consumer" and "talk[s] against the credit industry." *Id.* at 32, 60. *See also* Krucoff, *When Cash Pays Off*, Wash. Post, Sept. 22, 1981 (quoting American Express spokesman emphasizing the "big psychological ... difference" between surcharges and discounts). Congress ultimately renewed the ban for an additional three years. Pub. L. No. 97-25, 95 Stat. 144 (1981).

Over the next few years, opposition to the ban intensified. In 1984, when it was again set to expire, Senator William Proxmire cut to the chase: "Not one single consumer group supports the proposal to continue the ban on surcharges," he observed. "The nation's giant credit card companies want to perpetuate the myth that credit is free." Molotsky, *Extension of Credit Surcharge Ban*, N.Y. Times, Feb. 29, 1984, at D12. This time, the ban lapsed. Levitin, *Priceless?*, 55 UCLA L. Rev. at 1381.

D. The credit-card industry lobbies states to enact no-surcharge laws and adopts contractual no-surcharge rules

After the national ban expired in 1984, the credit-card industry convinced ten states (including New York)

to enact no-surcharge laws of their own.[1] New York's law took effect later that year.

Its legislative history does not hide the fact that it aimed to influence consumers' perceptions of credit cards by controlling the labels that merchants could use to describe mathematically equivalent transactions. A memorandum justifying the state's support for the law declared: "Surcharges, even if only psychologically, impose penalties on purchasers and may actually dampen retail sales. A cash discount, on the other hand, operates as an incentive and encourages desired behavior." CA2 J.A. 114.

Around the same time that New York's law was enacted, the major credit-card companies changed their contracts with merchants to include no-surcharge rules. No-surcharge laws in New York and other states thus function as a legislative extension of the restrictions that credit-card issuers previously imposed more overtly by contract.

E. Enforcement of New York's law

Despite these parallel contractual rules, New York has policed its law with vigor. In the first reported prosecution, the state brought criminal charges against a gas-station owner who offered dual pricing and put up signs that "clearly stated the 'cash price' and the 'credit

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[1] *See* Cal. Civ. Code § 1748.1(a); Colo. Rev. Stat. § 5-2-212; Conn. Gen. Stat. § 42-133ff; Fla. Stat. § 501.0117; Kan. Stat. Ann. § 16a-2-403; Me. Rev. Stat. Ann. tit. 9-A, § 8-509; Mass. Gen. Laws Ann. ch. 140D, § 28A(a)(1)-(2); Okla. Stat. tit. 14a, § 2-211(A); Tex. Fin. Code § 339.001; *see also* P.R. Code tit. 10, §§ 11, 12. An eleventh state, Utah, passed a similar law in 2013, only to repeal it a year later, after the district court's decision in this case striking down New York's law. Utah Code Ann. § 13-38a-202 (2013), *repealed by* § 63I-1-213 (2014).

price' for his gasoline," which differed by five cents per gallon. *People v. Fulvio*, 517 N.Y.S.2d 1008, 1010 (N.Y. Crim. Ct. 1987). The owner was convicted because his cashier made the mistake of telling a customer that it would cost "five cents extra" to use a credit card instead of saying that it would cost a "nickel less" to use cash. *Id.* at 1009-14. The conviction was short-lived, however, because the court held that the law was unconstitutionally vague, for it treats "precisely the same conduct . . . either as a criminal offense or as lawfully permissible behavior, depending only upon the *label* the individual affixes to his economic behavior." *Id.* at 1011.

Fulvio may have temporarily dampened enforcement efforts, but it did not end them. In 2008 and 2009, the Attorney General brought a series of sweeps against more than 50 merchants, many of whom were targeted even though they clearly disclosed their prices, explaining that they charge a certain amount "more" to pay with credit. The Attorney General's office told them that this explanation was illegal and gave specific instructions on how to describe their pricing schemes to customers.

To take one example, Parkside Fuel, a small heating-oil seller, used to impose a credit-card fee, which it informed customers of "on the phone, at the same time that [it] informed them of [its] prices." CA2 J.A. 153. In 2009, someone from the Attorney General's office called "pretending to be a customer ordering oil," and an employee "quoted the price of oil and said that [Parkside] charge[s] a fee on top of that price for using a credit card." *Id.* at 154. An Assistant Attorney General told Parkside's owner that, to comply with the law, he did not have to change any of the amounts that he charged, but his employees had to "characteriz[e] the difference between paying with cash and paying with credit as a cash 'discount,' not a credit 'surcharge.'" *Id.* The Assistant Attorney General then gave the owner "a script of what

[he] could tell customers when talking to them over the phone," saying that he "could quote the price [of heating oil] as $3.50/gallon, for example, and then explain to customers that they would receive a $.05/gallon 'discount' for paying with cash," but he "could not quote the price as $3.45/gallon while explaining that they would have to pay a $.05/gallon 'surcharge' to use a credit card." *Id.*

In another case, the Assistant Attorney General told the merchant: "You can charge more for a credit card all you want, but you have to say that this is the cash discount rate." *Id.* at 162.

III. This litigation

A. In June 2013, not long after Visa and MasterCard dropped their contractual no-surcharge rules as part of the nationwide antitrust settlement, five merchants brought this case. Although their circumstances differ slightly, they all want the same thing: to truthfully tell their customers that there is an "additional fee" or "surcharge" for using credit.

Expressions Hair Design, for example, posted a sign informing customers that, "due to the high swipe fees charged by the credit-card industry," it would charge 3% more for paying by credit. CA2 J.A. 98. But, in 2012, Expressions took down the sign after it learned of New York's law. *Id.* The salon now tells customers that it has two different prices—a lower price for cash and a higher one for credit. *Id.* But because of the law, Expressions cannot communicate its price difference how it would like—by calling the difference a "surcharge." It "would like to be able to put [its] sign back up." *Id.* at 151.

Like Expressions, the other four plaintiffs want to charge their customers two different prices depending on whether they pay with cash or credit and to call the difference a "surcharge" for credit. *Id.* at 79, 83, 88, 93.

These merchants do not offer cash discounts because they believe that "[l]abeling the difference as a 'discount' . . . would not be nearly as effective as calling it a 'surcharge.'" *Id.* at 88.

Just as important, the merchants are also concerned about complying with state law. Plaintiff Brooklyn Farmacy, for instance, is "not willing to take the risk that [it] might be prosecuted by the state simply for conveying truthful information to [its] customers about the higher cost of using a credit card." *Id.* at 89. The other merchants likewise worry that they could accidentally subject themselves to criminal liability if an employee makes "the mistake of telling customers"—truthfully—"that they are paying more for using credit cards." *Id.* at 94.

B. After filing suit, the plaintiffs moved for a preliminary injunction, arguing that the law violates the First Amendment and is unconstitutionally vague. In opposition, the state admitted that there is no difference between the two labels "in terms of the underlying economic value" of what they describe. Dist. Ct. Hearing Tr. 6/14/13, at 5-6. Yet the state took the view that the law "regulates conduct, not speech." Dist. Ct. Dkt. 27, at 36. The state elaborated: "It is true that if sellers want to use dual pricing, § 518 affects *how* they may communicate it[.] . . . But § 518 does not dictate the *content* of that communication at all; sellers are free to set the credit card price at whatever level they wish." *Id.* at 37.

The district court was not persuaded. It held that the law "plainly regulates speech" because it "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." App. 73a. Under the law, the district court explained, "if a vendor is willing to sell a product for $100 cash but charges $102 when the purchaser pays with a credit card, the vendor risks prosecution if it tells

the purchaser that the vendor is adding a 2% surcharge because the credit card companies charge the vendor a 2% 'swipe fee.' But if, instead, the vendor tells the purchaser that its regular price for the product is $102, but that it is willing to give the purchaser a $2 discount if the purchaser pays cash, compliance with section 518 is achieved." App. 56a. "[T]his virtually incomprehensible distinction between what a vendor can and cannot tell its customers offends the First Amendment." *Id.*

The court noted that the state's "suggestion to the contrary"—that the law regulates conduct because it only "'affects *how* [merchants] may communicate'" dual-pricing schemes, not pricing itself—"turns the speech-conduct distinction on its head." App. 73a. The court highlighted the flaw in the state's logic:

> [I]n defendants' view, setting prices (which section 518 does not regulate) is speech, but communicating those prices to consumers (which the statute, on defendants' own analysis, does regulate) is conduct. That is precisely backwards. Pricing is a routine subject of economic regulation, but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment.

App. 74a. The court then found that the law "cannot past muster" under the four-part *Central Hudson* test for commercial-speech restrictions, and had "little difficulty concluding" that it is too vague. App. 75a, 80a. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

C. After stipulating to a final judgment in the plaintiffs' favor, the state appealed and the Second Circuit reversed. It held that the law regulates "merely prices," not speech, and thus need not satisfy scrutiny. App. 21a.

The court began its analysis by dividing up the plaintiffs' challenge into two parts, based on a belief that they were "claiming First Amendment protection for two distinct kinds" of dual-pricing schemes. The first was the core of the plaintiffs' challenge—their preferred way of communicating their prices: a scheme in which the merchants "post only a single price" on the label for each product, while communicating the surcharge amount through a separate sign (*e.g.*, "3% credit-card surcharge"). App. 15a. The second was a scheme in which a merchant "posts two different prices" on the label for each product and "characterize[s] this price differential as a 'surcharge'" (or as costing "more"). App. 16a.

"As applied to single-sticker-price schemes," the court upheld the law as a regulation of conduct. App. 18a. The court determined that the merchant's decision of which price to frame as the "regular" price on the "sticker," and which to convey through a separate sign, was not itself "a communicative act." App. 25a. If it were, the court reasoned, that would "amount[] to the position" that "prices are themselves speech." App. 25a-26a.

Turning to the second part—whether the law unconstitutionally prohibits merchants from posting two different prices for each product and characterizing the difference as a credit "surcharge"—the court declined to "reach the merits" and instead chose to abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). App. 28a. Disregarding the law's enforcement history, the court concluded that "[i]t is far from clear that Section 518 prohibits the relevant conduct." App. 31a. The court also held that the law is not unconstitutionally vague "for essentially the same reasons" that it rejected the First Amendment challenges. App. 41a.

REASONS FOR GRANTING THE PETITION

I. The circuits are split over whether no-surcharge laws unconstitutionally restrict speech.

In the decision below, the Second Circuit held that New York's no-surcharge law regulates "merely prices" and thus "does not implicate the First Amendment." App. 20a-21a. Since then, two other circuits have addressed whether indistinguishable state laws violate the First Amendment. One answered yes, in "direct conflict" with the decision below. *Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1257 (11th Cir. 2015) (Carnes, C.J., dissenting). The other answered no. Both produced dissents. The result is an acknowledged and deepening "circuit split" that only this Court can resolve. *Rowell v. Pettijohn*, 816 F.3d 73, 78 (5th Cir. 2016).

A. On one side of the split is the Eleventh Circuit, which declared Florida's virtually identical law "an unconstitutional abridgment of free speech." *Dana's R.R. Supply*, 807 F.3d at 1251. Unlike the Second Circuit, the Eleventh Circuit rejected the state's argument that the law regulates pricing, not speech. "After all," the court explained, "what is a surcharge but a negative discount? If the same copy of Plato's *Republic* can be had for $30 in cash or $32 by credit card, absent any communication from the seller, does the customer incur a $2 *surcharge* or does he receive a $2 *discount*? Questions of metaphysics aside, there is no real-world difference between the two formulations," making the law "a restriction on speech, not a regulation of conduct." *Id.* at 1245.

Applying intermediate scrutiny, the Eleventh Circuit made "short shrift" of the law, finding that it "founders at every step." *Id.* at 1249. It "does not target false or misleading speech," the court explained, because "[c]alling the additional fee paid by a credit-card user a *surcharge* rather than a *discount* is no more misleading

than is calling the temperature *warmer* in Savannah rather than *colder* in Escanaba." *Id.* The court "struggle[d] to identify a plausible governmental interest" served by the law, "much less one that could be considered substantial." *Id.* And even assuming such an interest existed, the law would "prove[] too broad and too blunt a means to its end." *Id.* at 1250. "By holding out *discounts* as more equal than *surcharges*," the court concluded, the law "overreaches to police speech well beyond the State's constitutionally prescribed bailiwick." *Id.* at 1251.

Chief Judge Carnes dissented, expressing his view that the statute should be read to prohibit only undisclosed surcharges (akin to a false-advertising law), to save it "from a fatal constitutional flaw" and "a great big First Amendment bullseye." *Dana's R.R. Supply*, 807 F.3d at 1252-53. He noted that, by rejecting that reading, the majority had created a "direct conflict with our sister circuit on this issue." *Id.* at 1257.

B. That conflict has since deepened. On the side opposite the Eleventh Circuit, the Second Circuit has now been joined by a divided Fifth Circuit panel, further entrenching the "circuit split." *Rowell*, 816 F.3d at 78.

Finding the Second Circuit's reasoning "persuasive"—and rejecting the Eleventh Circuit's reasoning as "unavailing"—the Fifth Circuit held that Texas's no-surcharge law "regulates conduct, not speech, and, therefore, does not implicate the First Amendment." *Id.* at 80, 83. The majority acknowledged that Texas's law (like Florida's and New York's) allows a merchant to "dual-price as it wishes," so a merchant may achieve the "same ultimate economic result" whether expressed as a cash discount or credit-card surcharge. *Id.* at 81. Yet the majority thought that the Eleventh Circuit "overlook[ed]

differences in the economy activity" between surcharges and discounts. *Id.* at 83.

In dissent, Judge Dennis set forth his view that the law implicates the First Amendment because it "does not regulate the difference between [the cash and credit] prices," only how that difference is expressed. *Id.* at 86. "A merchant who describes the difference between these prices as a surcharge," Judge Dennis elaborated, "is not assessing 'additional' fees above a 'regular' price; he is only characterizing a perfectly legal price differential in a chosen way. If he violates the Anti–Surcharge Law it is because of the content of his speech, not because of the nature of his conduct." *Id.* at 85. Because the law "makes the legality of a price differential turn on the language used to describe it," Judge Dennis would have held that the law restricts "protected commercial speech" and "cannot survive" *Central Hudson* scrutiny. *Id.* at 86.[2]

C. This "growing circuit court split" has already led commentators to speculate that it "could prompt the U.S. Supreme Court to take up the issue." Ballard Spahr, *Fifth Circuit Rejects Constitutional Challenge to Texas "No Credit Card Surcharge" Law*, Consumer Fin. Servs. Grp. (Mar. 10, 2016), http://bit.ly/24vwupG; *see, e.g.*, Hudson, *Federal appeals courts split over law on credit card surcharges*, ABA Journal (Mar. 1, 2016), http://bit.ly/1QBC01x (observing that no-surcharge laws "have fared differently in federal appeals courts, setting the stage for possible future review by the U.S. Supreme

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[2] The Florida Attorney General has filed an application with Justice Thomas, requesting an extension of the time to file a petition for certiorari from the Eleventh Circuit's decision. *See Bondi v. Dann's R.R. Supply*, No. 15A1021. Justice Thomas granted the application, making the petition due on June 6. The plaintiffs in *Rowell* will also file a petition for certiorari, which is due on May 31.

Court"); Note, *Free Speech After* Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981, 1989 (2016) (discussing "the conflict between the Second and Eleventh Circuits"). That is especially true because the "conflicting cases" concern a fundamental constitutional question: they "illustrate the importance of the threshold determination of whether a regulation governs speech or conduct." Note, *Free Speech*, 129 Harv. L. Rev. at 1988.

Absent this Court's intervention, the split will only deepen. A California district court has declared that state's no-surcharge law unconstitutional, finding that it regulates only how "prices are conveyed to customers, not the prices themselves." *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1207 (E.D. Cal. 2015), *appeal pending* No. 15-15873 (9th Cir.). Although that decision is currently on appeal to the Ninth Circuit, that circuit can only take sides on the split; it cannot resolve the split. So there is no reason for the Court to await further percolation in the lower courts. Three circuits and four district courts have already issued opinions thoroughly grappling with the First Amendment issues presented here. And two of those opinions produced reasoned and thoughtful dissents. The time is ripe for this Court's review.

II. The question presented is one of exceptional national importance.

A growing circuit split is undesirable under any circumstances, but it is intolerable here given the need for national uniformity and the implications of the decision below.

A. The need for uniformity is undeniable. Thousands of merchants do business in different states (and across state lines) every day. That is why Congress long ago erected a national rule protecting the right of merchants to offer cash discounts. Now, after the recent landmark

$7.25 billion antitrust settlement with Visa and MasterCard, merchants are presented with the opportunity to truthfully convey the cost of credit as a surcharge. But because of the conflict, New York and Texas merchants—unlike those in Florida, California, and the 40 states without a no-surcharge law—cannot reap that benefit. And many merchants, like petitioner Patio.com, which has stores in both New York and Florida, are in a particularly difficult position. They can now communicate the cost of credit as a surcharge in some locations, but doing so in others could result in criminal liability.

All that is bad enough as it is. But, given the size and importance of the economies of New York and Texas, and the need for uniform pricing schemes, the reality is that national retailers are unlikely to use surcharging *at all*, even where it is permissible, as long as the split endures. This Court should grant certiorari to make clear that state no-surcharge laws violate the First Amendment, and thus ensure that merchants throughout the country operate under a single rule.

B. Even setting aside the need for uniformity, the question presented has enormous stakes for our economy. Because credit-card companies have been so successful in hiding the cost of credit from consumers, U.S. merchants pay some of the highest swipe fees in the world—around 3% of every credit-card purchase, or over $50 billion a year in fees. *See* 156 Cong. Rec. S4839 (June 10, 2010). This means that New York merchants alone pay several billion dollars in fees every year, which are passed on to customers in the form of higher prices. And these swipe fees have increased dramatically in recent years—even as they have decreased in countries that permit surcharges. Weiner & Wright, *Interchange Fees in Various Countries: Developments and Determinants*

14 (Fed. Reserve Bank, Working Paper 05-01, Sept. 6, 2005).

Allowing merchants to truthfully inform consumers of the cost of credit will not just lead to lower fees (and hence lower retail prices), but also reduce the "regressive transfer of income from low-income to high-income consumers." Schuh, *Who Gains and Who Loses from Credit Card Payments?*, at 2. Because no-surcharge laws bar merchants from communicating the cost of credit in the most effective way possible, most merchants instead simply increase sticker prices for all customers to recoup the cost of swipe fees. This creates a pervasive, "non-trivial" cross-subsidy: an annual "total transfer of $1,282 from the average cash payer to the average card payer." *Id.* at 3, 21. Rather than leave in place a circuit split that has the effect of prolonging an anticompetitive and regressive regime, this Court should grant certiorari and reverse the Second Circuit's decision.

III. This case presents an ideal vehicle to address the question presented.

This case is an ideal vehicle for resolving the circuit split and deciding whether state no-surcharge laws violate the First Amendment. There are no factual disputes. The case is not in an interlocutory posture. The state had an opportunity below to try to defend the law under *Central Hudson*. There is a robust record on enforcement of the statute—including declarations from merchants who were recently targeted by the Attorney General for violating the law (declarations that the state has not challenged)—so this Court need not speculate about how the law works on the ground. And although the Second Circuit abstained under *Pullman* from a subsidiary aspect of the plaintiffs' challenge, it directly addressed (and rejected) their core argument that New York's law unconstitutionally prevents them from ex-

pressing the cost of credit how they would like: as a "surcharge" (or "additional fee") on top of their "sticker" price.

That question—to which the circuits have given conflicting answers—is thus cleanly teed up by this petition. This Court should answer it.

IV. The decision below is wrongly decided under this Court's commercial-speech cases.

This Court has held that the First Amendment "requires heightened scrutiny" whenever the government creates restrictions that turn on the content of a speaker's words. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565-66 (2011). This scrutiny applies to any law whose "purpose and practical effect" are "to suppress speech" based on content, even if the law "on its face appear[s] neutral." *Id.*; *see McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (applying scrutiny "even though the Act says nothing about speech on its face"). Thus, "[t]he fact that [a] statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986). If a law makes liability "depend[] on what [people] say," in other words, it "regulates speech on the basis of its content." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010).

"Commercial speech is no exception." *Sorrell*, 564 U.S. at 566. The Court has long held that this speech—including speech conveying "price information" to consumers—is "protected by the First Amendment." *Va. St. Bd. of Pharmacy*, 425 U.S. at 770. So if a law's "purpose and practical effect" are to restrict price information or other commercial speech based on its content, then the law must withstand scrutiny. *Sorrell*, 564 U.S. at 565.

A. Without grappling with any of this authority, the Second Circuit concluded that New York's no-surcharge law "regulates conduct, not speech." App. 27a. But the law does not regulate *any* conduct: It does not regulate the amounts that merchants may charge for their goods, nor does it regulate the difference between the cash and credit prices. To the contrary, the law "targets expression alone." *Dana's R.R. Supply*, 807 F.3d at 1245.

The Second Circuit's own hypothetical proves the point. Here is what the court said:

> If a consumer thinks, based on a seller's sticker price, that she will be paying $100 for the seller's goods or services, then she will be annoyed if it turns out that she actually has to pay $103 simply because she has chosen to use a credit card; by contrast, if the sticker price is $103, she will be less annoyed by having to pay $103, even if cash customers only have to pay $100.

App. 23a. Although the Second Circuit drew from this hypothetical the conclusion that "[n]othing about the consumer's reaction in either situation turns on any words uttered by the seller," *id.*, that is mistaken. The consumer is "annoyed" in the first instance because she was misled by the sticker price (what the seller *said* the price was). As Judge Sutton has explained, something "cannot simultaneously be non-communicative" and "yet pose the risk of *communicating* a misleading message." *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 510 (6th Cir. 2008). Even if the hypothetical seller said nothing aloud, the First Amendment protects more than just conversations. The way in which a merchant chooses to communicate price information to consumers—on stickers, signs, advertisements, and the like—is itself speech. *Va. St. Bd. of Pharmacy*, 425 U.S. at 770.

Misleading commercial speech can of course be regulated. But that is because it gets no First Amendment protection—not because it isn't speech. The petitioners, however, wish to communicate truthful, *non*-misleading information: They want to frame the cash price as the "sticker" price and the price difference as a "surcharge." That "is no more misleading than is calling the temperature *warmer* in Savannah rather than *colder* in Escanaba." *Dana's R.R. Supply*, 807 F.3d at 1249.

The enforcement history of New York's law confirms that it regulates speech. In the first reported prosecution under the statute, a gas-station owner was prosecuted and convicted because his cashier truthfully informed a customer that it cost "five cents 'extra'" to use credit rather than saying that it was a "nickel less" to use cash. *Fulvio*, 517 N.Y.S.2d at 1013. The state court set aside the conviction as constitutionally "intolerable," observing that the law "creates a distinction without a difference; it is not the *act* which is outlawed, but the *word* given that act." *Id.* at 1015. And the state's continued enforcement efforts bear this out: The Attorney General's office recently told a heating-oil seller that, to comply with the law, he need not change the amounts he actually charges consumers, but must convey the difference between the cash and credit prices "as a cash 'discount,' not a credit 'surcharge.'" CA2 J.A. 154. The state even gave the seller "a script of what [he] could tell customers." *Id.*

These examples demonstrate that the no-surcharge law operates as a content-based speech restriction. As the Eleventh Circuit observed, "there is no real-world difference between the two formulations." *Dana's R.R. Supply*, 807 F.3d at 1245. The only difference is speech.

And regulating that speech was the law's purpose. It was enacted to fill the gap left by the federal ban's expi-

ration—a ban resulting from years of lobbying by credit-card companies who understood that the surcharge label "talk[s] against the credit industry." *Cash Discount Act, 1981: Hearings on S. 414*, at 32, 60. Like Congress, New York knew that credit surcharges and cash discounts, although "mathematically the same," are "very different" in terms of their "practical effect and impact . . . on consumers." S. Rep. No. 97-23, at 3 (1981). Indeed, the state justified the law based on the different psychological effects that the two words have on consumers' understanding and behavior: "Surcharges, *even if only psychologically*, impose penalties on purchasers . . . . A cash discount, on the other hand, operates as an incentive and *encourages desired behavior*." CA2 J.A. 114 (emphasis added).

The law affects consumer spending, in other words, "only through the reactions it is assumed people will have to the free flow of [credit-card] price information." *Va. St. Bd. of Pharmacy*, 425 U.S. at 769. There is no doubt that this assumption is well placed in the credit-card context. *See* Levitin, *Priceless?*, 55 UCLA L. Rev. at 1352. But states may not pass laws that seek to "diminish the effectiveness" of communication simply because they think certain speech is too powerful. *Sorrell*, 564 U.S. at 565. Courts must "be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996). Fear that "the public will respond 'irrationally' to the truth," *id.*, or "would make bad decisions if given truthful information," is no justification for banning speech, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002). Hence, states should "assume that . . . information is not in itself harmful, that people will perceive their own best interests if only they are well enough

informed, and that the best means to that end is to open the channels of communication rather than to close them." *Va. St. Bd. of Pharmacy*, 425 U.S. at 770.

New York's no-surcharge law does just the opposite. It hides the true cost of credit from customers to prevent negative reactions by "consumers [who] dislike being charged extra." App. 23a. And it does so not because of paternalism, but to "give one side"—the credit-card industry—"an advantage" by muzzling merchants. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978).

B. Because New York's law regulates speech, it must satisfy First Amendment scrutiny. This Court has traditionally subjected commercial-speech restrictions to intermediate scrutiny under the *Central Hudson* test, which asks four questions: (1) whether the speech "concern[s] lawful activity and [is] not . . . misleading"; (2) "whether the asserted governmental interest" justifying the regulation "is substantial"; (3) "whether the regulation directly advances the governmental interest asserted"; and (4) whether the challenged law "is not more extensive than is necessary to serve that interest." 447 U.S. at 566.

This Court should "easily conclude[]," App. 75a n.8, as Judge Rakoff did, that the law flunks every part of this test—and, indeed, that it "crumbles under *any level* of heightened First Amendment scrutiny," *Dana's R.R. Supply*, 807 F.3d at 1239 (emphasis added).

First, all parties agree that dual-pricing practices are lawful, and the district court found that surcharges "actually make consumers more informed rather than less" by "truthfully and effectively conveying the true costs of using credit cards." App. 76a. *Second*, the law does not "directly advance[]" any governmental interest; to the contrary, it "perpetuates consumer confusion by

preventing sellers from . . . educat[ing] consumers about the true costs of credit-card usage." App. 77a. And the law is "riddled with numerous 'exemptions and inconsistencies [that] bring into question the purpose' of the statute." *Id.* (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995)). For one thing, the state exempts *itself* and "certain favored utilities" from the law's prohibition. *Id. Third*, the law "is far broader than necessary to serve any asserted antifraud purpose." App. 78a. As the district court observed, the state "easily could have limited its regulation to surcharges that are deceptive or misleading." *Id.* Or it could have enacted a law like those in Georgia or Minnesota, which permit surcharges so long as they are conspicuously disclosed. *See* Ga. Code § 13-1-15 (2015); Minn. Stat. § 325G.051(1)(a)(1) (2015).

The law's First Amendment deficiencies are exacerbated by its vagueness—that is, its failure "to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," and its encouragement of "arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Indeed, the district court (echoing the state court in *Fulvio*) had "little difficulty" concluding that the law is "impermissibly vague." App. 80a; *see Fulvio*, 517 N.Y.S.2d at 1012 (holding the law to be "so vague, uncertain and arbitrary of enforcement as to be fatally defective"). To see the law's vagueness, imagine that you are a merchant who offers dual pricing and decides to sell a product for $100 if the customer pays in cash and $102 if the customer pays with credit. How do you comply with the law? What can you say? As the court that struck down California's law asked: Can you list the price as "$100+2% surcharge"? *Italian Colors*, 99 F. Supp. 3d at 1211. "Does that scenario constitute an unlawful surcharge since the percentage is calculated at the cash register?" *Id.* What

if you listed the price as $100 but put up "large signs displayed throughout the establishment stating that a 2% surcharge will be applied for purchases made with credit cards?" *Id.* And what if one of your customers calls and asks for your prices? What do you tell them?

As a result of the law's uncertainty, the petitioners have been forced to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked," thus making the law's speech restriction even worse. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 807 (2011) (quotation marks and ellipsis omitted).

C. Rather than see the law's vagueness as another sign of its unconstitutionality, the Second Circuit compounded its errors by wrongly invoking *Pullman* abstention. After addressing the core of the plaintiffs' challenge—whether they can convey the cash price as the "regular" sticker price, and the credit-card price as an "additional" fee (or "surcharge") on a separate sign—the court determined that a secondary aspect of their challenge "turns on an unsettled question of state law." App. 28a. Specifically, the court abstained as to whether the law may be constitutionally applied to a merchant who, like the gas-station owner in *Fulvio*, "posts two different prices" on each product and "characterize[s] this price differential as a 'surcharge'" (or as costing "more"). App. 15a-16a.

But this Court has repeatedly emphasized that "the abstention doctrine is inappropriate for cases" in which "statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities." *Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965); *see City of Houston v. Hill*, 482 U.S. 451, 467 (1987); *Procunier v. Martinez*, 416 U.S. 396, 404 (1974); *Baggett v. Bullitt*, 377 U.S. 360, 378-79 (1964). "[A] federal court's 'obligation' to hear and

decide" cases within its jurisdiction "is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (internal quotation marks omitted). And that principle has "particular significance when, as in this case, the attack upon the statute on its face is for repugnancy to the First Amendment." *Zwickler v. Koota*, 389 U.S. 241, 252 (1967).

That is because, as this Court long ago explained, abstaining in a First Amendment challenge may "well result in the denial of any effective safeguards against the loss of protected freedoms of expression," which "cannot be justified." *Dombrowski*, 380 U.S. at 492. Put differently, "forc[ing] the plaintiff who has commenced a federal action to suffer the delay of state court proceedings" in a First Amendment challenge "might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler*, 389 U.S. at 252. That is why the Ninth Circuit has adopted effectively a categorical "rule that federal courts should not invoke *Pullman* abstention in cases implicating First Amendment rights." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014); *see, e.g.*, *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010); *Porter v. Jones*, 319 F.3d 483, 491-94 (9th Cir. 2003); *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989).

The Second Circuit's endorsement of *Pullman* cannot be reconciled with these precedents, and is further proof that the court failed to safeguard the petitioners' First Amendment rights. The court dismissed out of hand any possibility that those rights will be chilled by forcing the petitioners to litigate part of their claims in state court. App. 40a. It even suggested that federal courts can be "an unwise choice of forum" for such challenges, *id.*—a statement that misunderstands that First Amendment rights are "*always* an area of particular

federal concern," *Ripplinger*, 868 F.2d at 1048 (emphasis added). This Court should intervene to protect them.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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May 12, 2016

APPENDIX

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APPENDIX A

United States Court of Appeals,
Second Circuit

Nos. 13–4533, 13–4537

EXPRESSIONS HAIR DESIGN, Linda Fiacco, The Brooklyn Farmacy & Soda Fountain, Inc., Peter Freeman, Bunda Starr Corp., Donna Pabst, Five Points Academy, Steve Milles, Patio.com LLC, David Ross,
Plaintiffs– Appellees,

v.

Eric T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, Charles J. Hynes, in his official capacity as District Attorney of Kings County,
Defendants–Appellants.

December 11, 2015

Appeals from the United States District Court for the Southern District of New York

Before: WESLEY, LIVINGSTON, and CARNEY, *Circuit Judges*.

DEBRA ANN LIVINGSTON, *Circuit Judge*:

New York General Business Law § 518 ("Section 518") provides that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." Plaintiffs–Appellees in this action ("Plaintiffs") are five New York businesses and their owners and managers.[1] They sued the Attorney General of the State of New York and the District Attorneys of New York County and Kings County (collectively, "New York") in the United States District Court for the Southern District of New York, claiming that Section 518 violates the First Amendment's Free Speech Clause and is void for vagueness under the Fourteenth Amendment's Due Process Clause. The district court (Jed S. Rakoff, *Judge*) agreed with Plaintiffs on both counts, and eventually entered a final judgment declaring Section 518 unconstitutional and permanently enjoining New York from enforcing the law against Plaintiffs. On appeal, we conclude that the application of Section 518's text to surcharges added to single sticker prices violates neither the First Amendment nor the Due Process Clause. We further decline to address other applications, invoking

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[1] Plaintiffs are Expressions Hair Design, a unisex hair salon in Vestal, New York, and its co-owner, Linda Fiacco; The Brooklyn Farmacy & Soda Fountain, Inc., an ice-cream parlor in Brooklyn, and its co-founder, Peter Freeman; Bunda Starr Corp., which owns a Manhattan liquor store, and its president, Donna Pabst; Five Points Academy, a Manhattan martial arts studio, and its vice president, Steve Milles; and Patio.Com LLC, an outdoor furniture and billiards company with stores throughout New York, and its founder and president, David Ross.

Pullman abstention. See *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). We therefore vacate the judgment entered by the district court and remand for dismissal of Plaintiffs' claims.

BACKGROUND

A. "Swipe Fees" and Credit-Card Surcharges

Every time a consumer pays for goods or services with a credit card, the credit-card issuer charges the merchant a percentage of the purchase price. (The parties and literature refer to these fees as "swipe fees" or "merchant-discount fees.") The typical fee is two to three percent of the transaction amount. Plaintiffs and other businesses that chafe at these fees would like to pass them along to consumers while also making consumers aware of the charge in an effort to convince them to pay cash. Accordingly, they would like to charge more than their regular price to customers who use credit cards; that is, they would like to impose a "surcharge" on credit-card users. Another way of passing the cost of credit along to customers is to offer a discount from the regular price to customers who use cash. While these two means of passing along the cost of credit may seem equivalent (in that they both ultimately result in credit-card customers paying more than cash customers), differences between them have led to a series of efforts by both credit-card companies and legislators to prohibit credit-card surcharges specifically.

One difference between credit-card surcharges and cash discounts involves consumers' reactions to them. A psychological phenomenon known as "loss aversion" means that "changes that make things worse (losses) loom larger than improvements or gains" of an equivalent amount. Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991). For this reason,

credit-card surcharges are more effective than cash discounts at discouraging credit-card use among consumers, which has naturally led credit-card companies to oppose them. *See* Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behav. & Org. 39, 45 (1980). But some consumer advocates and lawmakers, too, have favored protecting consumers from the inconvenience and annoyance of having extra charges added to their bills, and have also suggested that discouraging credit-card use may have adverse economic effects on the broader economy by "dampen[ing] retail sales." J.A. 114.

According to proponents of prohibitions on credit-card surcharges, experience also suggests that such surcharges will tend to exceed the amount necessary for the seller to recoup its swipe fees, meaning that sellers will effectively be able to extract windfall profits from credit-card users.[2] By contrast, cash discounts are unlikely to lead to the same problem, because merchants will not set the amount of the discount higher than the marginal cost of credit. *See, e.g.*, Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1352 (2008) ("[M]erchants' ability to discount is limited by the spread between the credit price and the merchandise cost to the merchant. If the merchant offers discounts by more than that spread, the merchant will lose money on the transaction. Merchants might need to increase the credit price to create a sufficient spread to profitably offer a discount that affects consumer behavior."). Further, because credit-card surcharges (unlike cash discounts)

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[2] When credit-card surcharges were legalized in Australia, for example, they rose to about twice the amount that sellers actually had to pay in swipe fees, despite predictions that competition among sellers would prevent this from happening.

offer a means of increasing customers' bills, dishonest sellers may attempt to profit at their customers' expense by imposing surcharges surreptitiously at the point of sale.

B. The Lapsed Federal Ban on Credit-Card Surcharges

New York enacted Section 518 in 1984. Because the law's enactment was motivated by the expiration of a federal law that prohibited credit-card surcharges, we briefly recount the history of that federal law.

In the early days of credit cards, credit-card issuers' contracts with merchants prohibited merchants from charging different amounts to customers who used credit cards and those who used other methods of payment. In 1974, however, Congress amended the federal Truth in Lending Act ("TILA") to protect merchants' ability to offer their customers discounts for using cash. *See* Fair Credit Billing Act § 167, Pub. L. No. 93–495, tit. III, 88 Stat. 1500 (1974) (codified in relevant part at 15 U.S.C. § 1666f(a)) (providing that issuers could not "prohibit ... seller[s] from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card"). In the same amendments, Congress also provided that these protected cash discounts did not rank as "finance charges" governed by TILA's disclosure requirements. *Id.* In 1975, the Federal Reserve Board (the "Fed") promulgated a regulation clarifying that the statutory exemption from TILA's disclosure requirements did not also apply to credit-card surcharges. *See Fair Credit Billing, Description of Transactions*, 40 Fed. Reg. 43,200, 43,203 (Sept. 19, 1975). In 1976, Congress again amended TILA to both ratify the Fed's interpretation and ban credit-card surcharges entirely. *See* An Act to Extend the State Taxation of Depositories Act, Pub. L.

No. 94–222, 90 Stat. 197 (1976) (the "1976 Amendments"). Specifically, the 1976 Amendments provided: "[n]o seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means." *Id.* § 3(c)(1). Moreover, to clarify the distinction between protected discounts and newly unlawful surcharges, the 1976 Amendments defined the term "surcharge" as "any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means"; defined the term "discount" as "a reduction made from the regular price"; and clarified that a discount "shall not mean a surcharge."[3] *Id.* § 3(a) (codified in relevant part at 15 U.S.C. § 1602(q), (r)).

The 1976 Amendments' ban on credit-card surcharges was initially set to expire in 1979, but in 1978, Congress extended it until 1981. *See* Financial Institutions Regulatory & Interest Rate Control Act § 1501, Pub.L. No. 95–630, 92 Stat. 3641 (1978). In 1981, Congress extended the statute again, and—apparently in response to the charge that the distinction between credit-card surcharges and cash discounts remained difficult to understand—further clarified the matter by defining the term "regular price" as follows:

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[3] In the hearings leading up to the enactment of the 1976 Amendments, at least one congressman expressed disbelief that this clarification was needed, opining that the distinction between cash discounts and credit-card surcharges ought to be obvious. *See A Bill to Amend the Fair Credit Billing Act (Public Law 93–495) with Respect to the Use of Cash Discounts, and for Other Purposes: Hearing on H.R. 10209 before the Subcomm. on Consumer Affairs of the H. Comm. on Banking, Currency, and Housing*, 94th Cong. 96 (1975) (Statement of Congressman Wylie) ("[T]o say that the word 'surcharge' and the word 'discount' are synonymous, makes us all look like fools in my judgment.").

> the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of [a credit card] if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of [a credit card] and the other when payment is made by use of cash, check, or similar means.

Cash Discount Act § 102, Pub. L. No. 97–25, 95 Stat. 144 (1981) (codified in relevant part at 15 U.S.C. § 1602(y)).

The 1981 enactment provided that the ban on credit-card surcharges would expire on February 27, 1984. *Id.* § 201. The ban expired on that date, and Congress did not renew it. The federal ban's expiration motivated eleven states to enact their own laws prohibiting credit-card surcharges. New York was one of those states.

C. Section 518's Enactment

Section 518, in its entirety, reads as follows:

> No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.
>
> Any seller who violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or a term of imprisonment up to one year, or both.

N.Y. Gen. Bus. Law § 518.[4] Thus, Section 518's operative language is essentially identical to that of the lapsed

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[4] A "seller" is defined as "any person who honors credit cards or debit cards which may be used to purchase or lease property or services." N.Y. Gen. Bus. Law § 511.6.

federal surcharge ban, but it does not incorporate its federal counterpart's explicit definitions of "surcharge," "discount," and "regular price." 15 U.S.C. § 1602(q), (r), (y).

When the bill proposing Section 518 was introduced in the New York legislature, the bill summary indicated that the law was necessary to take the place of the lapsed federal surcharge ban. It cited the risk that merchants would, "at the time of the sale, raise or lower the price according to the method of payment," leaving the "consumer ... subject to dubious marketing practices and variable purchase prices." It also clarified, however, that "merchant[s] would be able to offer a discount for cash if they so desire." J.A. 109.

Advocacy groups were divided on the proposed bill. It was supported by the New York State Consumer Protection Board, which explained that surcharges "psychologically ... impose penalties on purchasers and may actually dampen retail sales," and also expressed the fear that permitting credit-card surcharges would undermine efforts to "insure that customers can depend on advertised claims and prices ... by permitting unannounced price increases at the point of sale." J.A. 114. However, the Retail Council of New York State opposed the bill, arguing that swipe fees required merchants to increase their prices, and that in the absence of surcharges, price increases would be spread across all customers, resulting in cash purchasers' effectively subsidizing credit-card users' purchases. Ultimately, the New York Senate passed Section 518 by a vote of fifty-two to seven, and the Assembly passed it unanimously.

D. Section 518's Enforcement History

Although New York's statutory ban on credit-card surcharges has been in effect for several decades, it was,

for much of that time, effectively redundant with standard provisions in credit-card issuers' contracts that prohibited sellers from imposing credit-card surcharges on customers (although, as previously noted, TILA guarantees sellers' freedom to offer cash discounts).[5] As a result, there are almost no reported cases involving Section 518's application.

The parties have cited just one reported prosecution under Section 518. In 1986, Eugene Fulvio, a gas-station owner, was charged with an attempted violation of the statute. Initially, a New York trial court rejected Fulvio's motion to dismiss on the ground that Section 518 was unconstitutionally vague on its face. *See People v. Fulvio*, 514 N.Y.S.2d 594, 597 (Crim. Ct. 1987) ("*Fulvio I*") (holding that Section 518 by its terms "gave the defendant fair warning as to what conduct was prohibited"). After a subsequent bench trial, however, a different trial-court judge granted Fulvio's renewed motion to dismiss on the ground that Section 518 was void for vagueness as applied to him. *See People v. Fulvio*, 517 N.Y.S.2d 1008, 1015 (Crim. Ct. 1987) ("*Fulvio II*") (finding the law unconstitutional because "it is not the *act* which is outlawed, but the *word* given that act"). Despite distinguishing *Fulvio I* on the ground that it had involved a facial as opposed to an as-applied challenge, the court in *Fulvio II* did not actually resolve a factual dispute as to whether Fulvio had posted separate cash and credit-card prices at his gas station (as

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[5] In the last decade, sellers began challenging these provisions in various antitrust lawsuits, which culminated in a nationwide class-action settlement pursuant to which Visa and MasterCard agreed to drop their contractual prohibitions on credit surcharges. *See In re Payment Card Interchange Fee & Merch. Discount Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013) (approving this settlement).

Fulvio had testified at trial), or instead posted a single price and then imposed a surcharge for credit-card use (as the complainant had testified). *See id.* at 1011–12.

In addition to the *Fulvio* prosecution, Plaintiffs point to another, more recent spate of enforcement activity involving Section 518. In 2009, the New York State Attorney General's office announced that it had reached settlements with fourteen heating-oil sellers in Suffolk County who had been violating Section 518. According to affidavits submitted by some of those sellers in this case, the sellers had communicated with their customers over the phone: the sellers "would tell [customers] the price of fuel (for example, $3.45/gallon) and then explain that there was a surcharge on top of that price for paying with a credit card (for example, $.05/gallon)." J.A. 153. The Attorney General's office told the sellers that these communications were illegal under Section 518, but that the sellers "could quote the price as $3.50/gallon ... and then explain to customers that they would receive a $.05/gallon 'discount' for paying with cash." J.A. 154.

E. Procedural History

Plaintiffs filed this action against New York in the Southern District of New York on June 4, 2013. Their July 15, 2013 amended complaint contains three claims (all brought pursuant to 42 U.S.C. § 1983), which allege, respectively, that Section 518 violates the First Amendment's free-speech guarantee, is void for vagueness under the Due Process Clause of the Fourteenth Amendment, and is preempted by the Sherman Antitrust Act. Plaintiffs sought a declaration that Section 518 is both unconstitutional and preempted, as well as an injunction against its enforcement.

In their amended complaint, Plaintiffs allege that they would like to charge credit-card customers more than cash customers to account for the credit-card

companies' swipe fees. Specifically, they would like to impose a credit-card surcharge, as opposed to offering a cash discount. According to the amended complaint, only one Plaintiff currently charges different amounts for credit and cash purchases: Expressions Hair Design, a unisex hair salon in Vestal, New York, alleges that its current policy is to charge two different prices, one for credit-card customers and one for cash customers. However, it claims to fear that describing this difference as a "surcharge," or "say[ing] that credit is 'extra' or 'more,'" might violate Section 518. J.A. 58.

On June 17, 2013, Plaintiffs moved for a preliminary injunction preventing Defendants from enforcing Section 518 against them, and New York moved to dismiss on ripeness and standing grounds, as well as for failure to state a claim. In supplemental affidavits submitted along with their motion, two Plaintiffs—Stephen Milles, the vice president of Five Points Academy, and Linda Fiacco, the co-owner of Expressions Hair Design—clarify the pricing schemes that they would like to use but which are (or may be) prohibited by Section 518. Milles avers that Five Points would like to impose "an extra charge, or 'surcharge,'" for credit-card users and to "display prominently the surcharge that the customer will incur." J.A. 149. According to Milles, "[i]t is not our intention to display two separate prices for each good and service that we offer, but rather to display—with roughly equal prominence—a single set of prices and the credit card surcharge amount." J.A. 149. Along similar lines, Fiacco avers that Expressions Hair Design would like to charge credit-card customers three percent more than cash customers, and to display a sign that "characterize[s] the price difference as a 3% credit-card surcharge on top of the listed cash price" without "displaying the total credit-card price as a dollar figure." J.A. 151.

On October 3, 2013, the district court issued an opinion granting Plaintiffs' preliminary injunction motion and denying New York's motion to dismiss. *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430 (S.D.N.Y. 2013). The district court found that Plaintiffs' challenge was ripe because they were presently chilled from implementing their preferred pricing scheme, and that Plaintiffs had standing based on a credible fear that Section 518 would be enforced against them. As for the First Amendment, the district court concluded that Section 518 burdens speech by "draw[ing] the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." *Id.* at 444. Applying the *Central Hudson* test for non-disclosure restrictions on commercial speech, the district court found Section 518 unconstitutional. *See id.* at 447. The district court also held that Section 518 was void for vagueness because it "turns on the labels that sellers use to describe their prices." *Id.* at 448. The court further held that Plaintiffs had demonstrated the other elements necessary for a preliminary injunction, and therefore "preliminarily enjoin[ed] the defendants from enforcing section 518 ... during the pendency of this case." *Id.* at 450. (The district court also denied New York's motion to dismiss Plaintiffs' preemption claim, though Plaintiffs had not sought a preliminary injunction on that ground.)

The parties stipulated to—and the district court entered, on November 4, 2013—a final judgment on Plaintiffs' First and Fourteenth Amendment claims, even though their preemption claim was still pending. *See* Fed. R. Civ. P. 54(b) ("[T]he court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."). In the final judgment, the district court (1) "declare[d] that [Section

518] violates the First Amendment and is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment," (2) "permanently enjoin[ed] the defendants from enforcing [Section 518] against the plaintiffs," and (3) dismissed Plaintiffs' preemption claim as moot, without prejudice. J.A. 213.

This appeal followed.

DISCUSSION

"When reviewing an order granting either a preliminary or a permanent injunction, we review the district court's legal holdings de novo and its ultimate decision for abuse of discretion." *Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.*, 764 F.3d 210, 214 (2d Cir. 2014). Because we conclude that the district court erred in holding that Section 518 violates the First Amendment and the Due Process Clause, we vacate the judgment entered below and remand for dismissal. We begin with the First Amendment.

I.

A.

Some preliminary discussion is necessary to frame more precisely the scope of Plaintiffs' First Amendment challenge. Again, the statute provides that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. Because the statute does not define the word "surcharge," we give it its ordinary meaning. *See FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011). A "surcharge" ordinarily means "a charge in excess of the usual or normal amount: an additional tax, cost, or impost." *Webster's Third New International Dictionary* 2299 (2002); *see also Black's Law Dictionary* 1579 (9th ed.

2009) (defining "surcharge" as "[a]n additional tax, charge, or cost"); *Duprey v. State of Conn., Dep't of Motor Vehicles*, 28 F. Supp. 2d 702, 707 (D. Conn. 1998) (explaining that "a fee is a surcharge if it is in excess of a usual or normal amount"). Accordingly, Section 518's use of the word "surcharge" assumes that a seller to which the statute applies will have a "usual or normal" price that serves as a baseline for determining whether credit-card customers are charged an "additional" amount that cash customers are not.

The parties agree that this baseline is not the ultimate price that the seller charges to cash customers, but rather is something different—namely, the seller's "regular" price. Importantly, then, Section 518 does not prohibit all differentials between the price ultimately charged to cash customers and the price ultimately charged to credit-card customers; it forbids charging credit-card customers an additional amount *above* the regular price that is not also charged to cash customers, but it permits offering cash customers a discount *below* the regular price that is not also offered to credit-card customers. (That is, it allows what we have termed "cash discounts.") To illustrate, if a seller's regular price is $100, it may not charge credit card customers $103 and cash customers $100, but if the seller's regular price is $103, it *may* charge credit-card customers $103 and cash customers $100. This distinction is consistent with the federal surcharge ban on which Section 518 was modeled, which (1) defined "surcharge" as "any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash," (2) defined "discount" as "a reduction made from the regular price," and (3) clarified that a discount "shall not mean a surcharge." 15 U.S.C. § 1602(q), (r).

If a surcharge means an additional amount above the seller's regular price, then it is basically self-evident how

Section 518 applies to sellers who post single, readily ascertainable prices for their goods or services (or what we will call "sticker prices"): the sticker price is the "regular" price, so sellers may not charge credit-card customers an additional amount above the sticker price that is not also charged to cash customers. As Plaintiffs point out, however, not all sellers post single sticker prices for their goods or services. The federal surcharge ban was eventually revised to account for this possibility by defining the term "regular price" so that the statute could never be violated unless the seller "tagged or posted" a single price. *See* 15 U.S.C. § 1602(y) (defining "regular price," in relevant part, as "the price charged ... when payment is made by [credit card] if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by [credit card] and the other when payment is made by use of cash, check, or similar means"). Section 518, by contrast, does not explicitly use the term "regular price," much less define it, nor does the law otherwise indicate whether or how it applies outside the single-sticker-price context. This difference between Section 518 and the lapsed federal surcharge ban raises certain questions about the former law's scope: Can a seller have a "regular" price if it does not post a single sticker price? If so, what is it?

With this background in mind, we turn to Plaintiffs' challenge to Section 518. Plaintiffs' submissions reveal that they are claiming First Amendment protection for two distinct kinds of pricing schemes. First, Plaintiffs aver that they would like to post only a single price for their goods and services and charge more than that price to credit-card customers, but are prohibited from doing so by Section 518. *See, e.g.*, J.A. 149 (Five Points Academy: "It is not our intention to display two separate prices for each good and service that we offer, but rather

to display—with roughly equal prominence—a single set of prices and the credit card surcharge amount."); J.A. 151 (Expressions Hair Design: "We would like to ... characterize the price difference as a 3% credit-card surcharge on top of the listed cash price."). In other words, Plaintiffs are seeking First Amendment protection for the kind of straightforward single-sticker-price scheme that Section 518 clearly prohibits. Second, Expressions Hair Design (the only Plaintiff to do so) currently posts two different prices for its services—one for credit-card customers and one for cash customers—and fears being prosecuted for characterizing this price differential as a "surcharge," or for telling its customers that credit costs "more." J.A. 56–58. (We will refer to this second pricing scheme as a "dual-price" scheme.)

Throughout the course of this litigation, Plaintiffs have attempted to demonstrate Section 518's unconstitutionality by reference to other, hypothetical pricing schemes that they neither currently employ at their businesses nor claim they would employ but for Section 518. Assessing a statute's constitutionality as applied to hypothetical situations not before the court, however, is appropriate only if the challenger is mounting a facial attack on the statute. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (explaining that "[f]acial challenges are disfavored" in part because they "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'" (quoting *Ashwander v. TVA*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring))). Two kinds of facial challenges are generally available in the First Amendment context: a plaintiff can attempt to

demonstrate either (1) "that the law is unconstitutional in all of its applications," or (2) that "a 'substantial number' of its applications are unconstitutional 'judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 449 & n. 6 (quoting *New York v. Ferber*, 458 U.S. 747, 769–71 (1982)). *But see Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 481 (1989) (noting that overbreadth challenges are normally not available in the context of commercial speech). In either case, where (as here) the plaintiff delineates the specific conduct for which it is claiming protection, assessing the challenged statute's constitutionality as applied to that conduct is a critical first step. If that analysis shows that the plaintiff's own conduct may lawfully be prohibited, then the statute is not "unconstitutional in all of its applications." Even in an overbreadth challenge, moreover, the Supreme Court has told courts not to consider whether a statute is substantially overbroad "before it is determined that the statute would be valid as applied." *Fox*, 492 U.S. at 484–85.

Plaintiffs do not clarify in their briefing whether they are, in fact, mounting a facial attack on Section 518.[6] At

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[6] In discussing facial and as-applied challenges, we recognize that these categories are simply useful analytical tools, as opposed to necessary elements of a plaintiff's claim. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 331 (2010). In all cases, a federal court is limited to determining the rights and obligations of the parties before it; whether a law is invalidated "on its face" or merely "as applied" therefore depends on whether or not the reasoning used to invalidate the law in the particular case before the court would apply equally in any challenge to the same law. *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2457–58 (2015) (Scalia, J., dissenting); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1339–40 (2000). In this case, we think the distinctions between facial and as-applied challenges are quite important analytically for the reasons given in the text.

oral argument, they suggested that their challenge is exclusively as-applied, but that characterization is in significant tension with their general failure to focus narrowly on the actual conduct in which they are engaged or would like to be engaged. Ultimately, however, any uncertainty regarding the scope of Plaintiffs' First Amendment challenge does not meaningfully affect our analysis. For the reasons set forth below, we conclude that Section 518 does not violate the First Amendment as applied to single-sticker-price sellers. We further conclude that any challenge premised on Section 518's application outside the single-sticker-price context (whether facial or as-applied) necessarily fails because Section 518 is "readily susceptible" to a construction under which its application is limited to that context. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988). The district court therefore erred in holding that Section 518 violates the First Amendment.

B.

As applied to single-sticker-price schemes like the ones described in Plaintiffs' submissions, Section 518 does not violate the First Amendment. Restrictions on commercial speech are traditionally analyzed under the four-factor test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). Plaintiffs argue, and the district court held, that Section 518 burdens commercial speech and does not survive *Central Hudson*. *See Expressions Hair Design*, 975 F. Supp. 2d at 444, 447. On appeal, New York argues that Section 518 regulates conduct, not speech; in the alternative, it maintains that the law survives *Central Hudson*.[7] Because we agree

[7] New York argues further that if we conclude that Section 518 does not regulate speech, we could uphold it under the test

with New York that Section 518 does not regulate speech as applied to single-sticker-price sellers, we do not reach the parties' arguments under *Central Hudson*.

We start from the premise—conceded by Plaintiffs—that prices, although necessarily communicated through language, do not rank as "speech" within the meaning of the First Amendment. This principle is illustrated most vividly by the fact that price-control laws, which necessarily prevent sellers from communicating certain (illegal) prices, have never been thought to implicate the First Amendment. *See, e.g., Munn v. Illinois*, 94 U.S. (4 Otto) 113, 125 (1876) ("[It] has been customary ... in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, & c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."). Accordingly, although the Supreme Court has now repeatedly held that the advertising of *lawful* prices is protected by the First Amendment, *see, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504–08 (1996) (plurality opinion); *Va. State Bd. of Pharmacy v. Va. Citizens' Consumer Council, Inc.*, 425 U.S. 748, 761–70 (1976), it has reaffirmed in doing so that states may continue to make certain prices unlawful through "direct regulation," *44 Liquormart*, 517 U.S. at 507 (plurality opinion); *accord id.* at 524 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 530 (O'Connor, J., concurring in the judgment); *see Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731

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applicable to restrictions on expressive conduct. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968). As explained in the text, we agree that Section 518 does not regulate speech, but because Plaintiffs have not argued that the law fails *O'Brien* scrutiny, we do not consider that possibility.

F.3d 71, 77 (1st Cir. 2013) ("In *44 Liquormart, Inc. v. Rhode Island*, a majority of the Justices, in striking down the categorical ban on liquor price advertising there, made clear that price regulations and other forms of direct economic regulation do not implicate First Amendment concerns." (citation omitted)).

If prohibiting certain prices does not implicate the First Amendment, it follows that prohibiting certain relationships between prices also does not implicate the First Amendment. Indeed, Plaintiffs readily concede that New York could simply prohibit sellers from charging different amounts for credit-card and cash purchases altogether without thereby "trigger[ing] First Amendment scrutiny." Appellees' Br. at 36. The problem with Section 518, in Plaintiffs' view, lies in the undisputed fact that the statute forbids credit-card surcharges while simultaneously permitting cash discounts. Because both credit-card surcharges and cash discounts ultimately amount to equivalent differences between the price charged to credit-card customers and the price charged to cash customers, Plaintiffs argue that (in the district court's words) Section 518 burdens protected expression by "draw[ing] the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." *Expressions Hair Design*, 975 F. Supp. 2d at 444. We disagree.

By its terms, Section 518 does not prohibit sellers from referring to credit-cash price differentials as credit-card surcharges, or from engaging in advocacy related to credit-card surcharges; it simply prohibits imposing credit-card surcharges. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (explaining that a statute regulates "conduct, not speech," when it affects what regulated entities "must *do*," not "what they may or may not *say*"). Whether a

seller is imposing a credit-card surcharge—in other words, whether it is doing what the statute, by its plain terms, prohibits—can be determined wholly without reference to the words that the seller uses to describe its pricing scheme. If the seller is charging credit-card customers an additional amount above its sticker price that it is not charging to cash customers, then the seller is imposing a forbidden credit-card surcharge. The only "words and labels" on which the operation of the statute thus depends are (1) the seller's sticker price and (2) the price the seller charges to credit card customers. But these two "words and labels" are merely prices. And, as we have explained and as Plaintiffs themselves recognize, prices (though necessarily communicated through language) are not "speech" within the meaning of the First Amendment, nor are they transformed into "speech" when considered in relation to one another. Because all that Section 518 prohibits is a specific relationship between two prices, it does not regulate speech.

Plaintiffs' chief error—or, perhaps more accurately, the central flaw in their argument—is their bewildering persistence in equating the actual imposition of a credit-card surcharge (i.e., a seller's choice to charge an additional amount above the sticker price to its credit-card customers) with the words that speakers of English have chosen to describe that pricing scheme (i.e., the term "credit-card surcharge"). This is the only way to make sense of Plaintiffs' argument that "[w]hat [Section 518] regulates—all that it regulates—is what merchants may say: Characterizing the price difference as a cash 'discount' is favored; characterizing it as a credit 'surcharge' is a crime." Appellees' Br. at 27. But Plaintiffs are simply wrong. What Section 518 regulates—all that it regulates—is the difference between a seller's sticker price and the ultimate price

that it charges to credit-card customers. A seller imposing a surcharge (an additional amount above its sticker price) on credit-card customers could choose to "characterize" that additional charge as whatever it wants, but that would not change the fact that it would be violating Section 518. Conversely, a seller offering a discount (a reduction from its sticker price) to cash customers could choose to "characterize" that reduction as whatever it wants (including as a "credit-card surcharge"), but that would not change the fact that the seller would *not* be violating Section 518. Of course, it is more likely that if a seller is imposing a credit-card surcharge, it will refer to its pricing scheme by its ordinary label—"credit-card surcharge"—while a seller offering a cash discount is likely to refer to its pricing scheme as a "cash discount." But the fact that these pricing schemes *have* different labels (and thus that sellers are likely to refer to them using different words) obviously does not mean that *all they are* is labels.

In Plaintiffs' view, credit-card surcharges and cash discounts must just be labels because consumers react differently to them: they react more negatively to credit-card surcharges than they react to cash discounts. Thus, Plaintiffs argue, New York has violated the First Amendment by banning a label it disfavors ("credit-card surcharge") while permitting a label it approves ("cash discount"). This argument, however, plainly begs the question: it assumes (incorrectly) that what New York has regulated are, in fact, labels. It is true, of course, that the government generally may not enact speech restrictions favoring one message over another. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to

serve compelling state interests."). But that well-established First Amendment principle is of no relevance whatsoever with respect to the threshold question whether the restriction at issue regulates speech or, instead, conduct.[8] In other words, as New York astutely observes, "[s]peech is not the only cause of consumer unhappiness; the mere fact that consumers react negatively to surcharges thus does not prove that surcharges are speech." Appellants' Reply Br. at 15.

In fact, consumers react negatively to credit-card surcharges not because surcharges "communicate" any particular "message," but because consumers dislike being charged extra. *See* Kahneman et al., *supra*, at 199 ("[C]hanges that make things worse (losses) loom larger than improvements or gains."). If a consumer thinks, based on a seller's sticker price, that she will be paying $100 for the seller's goods or services, then she will be annoyed if it turns out that she actually has to pay $103 simply because she has chosen to use a credit card; by contrast, if the sticker price is $103, she will be less annoyed by having to pay $103, even if cash customers only have to pay $100. Nothing about the consumer's reaction in either situation turns on any words uttered by the seller. And although the difference in the consumer's reaction to the two pricing schemes may be puzzling purely as an economic matter, we are aware of no authority suggesting that the First Amendment prevents states from protecting consumers against irrational psychological annoyances.

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[8] Plaintiffs' argument that Section 518 is "speaker-based," because it applies only to "sellers," is similarly circular. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2663 (2011) (applying heightened First Amendment scrutiny to statute that "burdens disfavored *speech* by disfavored *speakers* ") (emphasis added).

Although the First Amendment generally prevents the government from justifying a *speech* restriction by reference to the harmful reactions that the speech in question will cause among the reading or listening public, *see, e.g., Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) ("We have ... rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."), there is nothing controversial about the government's banning certain *prices* because of how consumers will react to them. The Supreme Court has said, for example, that states may enact price-control laws for the express purpose of suppressing consumer demand. *See 44 Liquormart*, 517 U.S. at 507 (plurality opinion) ("It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance ... [H]igher prices can be maintained either by direct regulation or by increased taxation."). Accordingly, in *National Association of Tobacco Outlets v. City of Providence*, the First Circuit held that the City of Providence, Rhode Island could, consistent with the First Amendment, prohibit discounts for tobacco products based on evidence that such discounts would lead "to higher rates of tobacco use among young people." 731 F.3d at 76 (quoting U.S. Dep't of Health & Human Servs., *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* 527–29 (2012)). Similarly, here, New York enacted Section 518 in part to prevent negative consumer reactions to credit-card surcharges—in effect, spurring

demand for credit-card use, instead of suppressing it. The First Amendment poses no obstacle to such a law.[9]

Plaintiffs' argument that Section 518 regulates how sellers "communicate" with their customers might also be understood as an argument that Section 518 regulates speech merely by forbidding sellers from setting their sticker prices lower than the prices that they ultimately charge to credit-card customers—in other words, that where a seller chooses to set its sticker price is a communicative act. Thus, if a seller wants to charge credit-card customers $103 and cash customers $100 in order to pass along the credit-card companies' swipe fees, the seller could (if Section 518 were no obstacle) either set its sticker price at $100 and thereby "communicate" a credit-card surcharge or, presumably just as easily, set its sticker price at $103 and thereby "communicate" a cash discount. This variation on Plaintiffs' argument, however, amounts to the position—which we have already rejected and which Plaintiffs

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[9] The subtext of Plaintiffs' argument that it is impermissible to regulate based on consumer reactions is their view that Section 518 was passed at the behest of the credit-card lobby to encourage consumers to use credit cards as opposed to cash. Even assuming that credit-card companies favored the law for that reason, however, the New York legislature identified a number of public-regarding rationales for the law's enactment. Moreover, a panel of this Court has recently expressed the view (that we need not address) that even unadulterated "economic favoritism" is a sufficiently rational basis to justify a state law regulating economic activity. *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 285–86 (2d Cir. 2015). Yet more pertinently here, Plaintiffs do not raise a rational-basis challenge to Section 518. Regardless of why New York wanted to prevent consumers from reacting negatively to credit-card surcharges, the *First Amendment* does not prohibit regulating on that basis where the object of the regulation is conduct, not speech. The wisdom of the policy choices animating Section 518 is not for us to judge.

concede is incorrect—that prices are themselves speech. The fact that sellers can move their sticker prices up and down with relative ease (and thus that sticker prices are, at least in some sense, not dictated by "economic realities") does not alter the fact that sticker prices, like any other prices, can be regulated without bringing the First Amendment into play.

In concluding that sticker prices are not constitutionally exceptional, we again draw support from the First Circuit's decision in *National Association of Tobacco Outlets*, which is both closely on-point and persuasive. There, the First Circuit rejected a First Amendment challenge to an ordinance that (among other things) barred retailers from using coupons "that provide[] any tobacco products without charge or for less than the listed or non-discounted price," and from selling tobacco products "through ... multi-pack discounts." 731 F.3d at 74. The plaintiffs argued that offering discounts to their customers was an inherently communicative act, but the First Circuit disagreed, reasoning that the ordinance did not "restrict[] retailers or anyone else from communicating pricing information concerning the lawful sale price of cigarettes," but rather "restrict[ed] the ability of retailers to engage in certain pricing practices." *Id.* at 77; *see also Nat'l Ass'n of Tobacco Outlets v. City of New York*, 27 F. Supp. 3d 415, 421–22 (S.D.N.Y. 2014) (relying on the First Circuit's decision to uphold a New York City law banning "the sale of cigarettes and tobacco products below the listed price"). Thus, the fact that the tobacco sellers readily could have lowered their "listed or non-discounted price" to the discounted price—thereby resulting in their customers ultimately paying the exact same amount for tobacco products—did not affect the fact that the ordinance regulated a pricing practice, not speech. Here, too, the fact that a seller can simply raise its sticker price to the

credit-card price—thereby resulting in its credit-card customers ultimately paying the exact same amount as they would have if the seller had set a lower sticker price and imposed a credit-card surcharge—does not affect the fact that Section 518 regulates a pricing practice, not speech.[10]

In short, Plaintiffs have provided no reason for us to conclude that Section 518, which regulates the relationship between a seller's sticker price and its credit-card price, differs in a constitutionally significant way from other laws that regulate prices and therefore do not implicate the First Amendment. As applied to single-sticker-price schemes like the ones described in Plaintiffs' submissions, Section 518 regulates conduct, not speech.[11]

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[10] Along similar lines, Plaintiffs appear to concede that laws against price-gouging—which regulate the difference between the seller's regular price and the price that may be charged in periods of unusually high demand, *e.g.*, N.Y. Gen. Bus. Law § 396-r—do not implicate the First Amendment. We do not see how a seller's normal price for the purpose of anti-price-gouging laws is meaningfully different from its sticker price for the purpose of Section 518.

[11] At least two district courts have previously reached this same conclusion with respect to other states' credit-card surcharge bans. *See Rowell v. Pettijohn*, No. 14–cv–190, slip op. at 6, 2015 WL 3637101 (W.D. Tex. Feb. 4, 2015) ("[T]he Texas Anti–Surcharge law regulates only prices charged, an economic activity that is within the state's police power, and does not implicate the First Amendment."); *Dana's Railroad Supply v. Bondi*, No. 14–cv–134, slip op. at 5 (N.D. Fla. Sept. 2, 2014) (holding that Florida's anti-surcharge law is a "[r]estriction on pricing" and thus not subject to First Amendment scrutiny). *But see Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1206–08 (E.D. Cal. 2015) (holding that California's anti-surcharge law burdened protected speech and violated the First Amendment), *appeal docketed*, No. 15–15873 (9th Cir. filed Apr. 30, 2015).

We note that under *United States v. O'Brien*, 391 U.S. 367 (1968), laws that exclusively regulate conduct (as Section 518 does) may nonetheless implicate the First Amendment in cases where the conduct at issue is "inherently expressive." *Forum for Acad. & Institutional Rights*, 547 U.S. at 66, 126 S.Ct. 1297. Plaintiffs, however, adhering steadfastly to their argument that Section 518 regulates speech, have not asked us to assess Section 518's constitutionality under the Supreme Court's expressive-conduct precedents. *See* Appellees' Br. at 38 n.4 ("Because the no-surcharge law regulates only speech, *United States v. O'Brien* is irrelevant."). We therefore decline to consider any such challenge.

C.

We now turn to the balance of Plaintiffs' First Amendment challenge, which is premised on the assumption that Section 518 applies to sellers who do not post single sticker prices. Because this portion of Plaintiffs' challenge turns on an unsettled question of state law, we do not reach the merits. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *see also Nicholson v. Scoppetta*, 344 F.3d 154, 168 (2d Cir. 2003) ("[W]e have an independent obligation to consider whether *Pullman* abstention is appropriate.").

Two sets of arguments relevant here turn on the question whether Section 518 applies outside the single-sticker-price context (and, if so, to what extent). First, Plaintiffs argue that Section 518 violates the First Amendment as applied to Expressions Hair Design's "dual-price" scheme. Under its scheme, Expressions Hair Design "charge[s] two different prices for haircuts and other services—a lower price for customers paying with cash, check, or debit card and a higher price for customers paying with a credit card." J.A. 57.

Expressions Hair Design allegedly fears that it will be prosecuted under Section 518 simply for "characterizing that price difference as a 'surcharge' or an 'extra' charge for paying with a credit card, even though its customers *do* effectively pay more for using a credit card." J.A. 57; *see also* J.A. 58.

Second, Plaintiffs posit a number of hypothetical pricing schemes that they do not actually employ (or profess any desire to employ), but which, Plaintiffs nonetheless suggest, deserve First Amendment protection. To take some specific examples that have been discussed over the course of this litigation: A seller might not post any prices at all, but ultimately charge credit-card customers more than cash customers to pass along the cost of the credit-card companies' swipe fees. Or the seller might post two sets of prices—one for credit and one for cash—but display the cash price more prominently to its customers. Or the seller might "advertise[] two prices with equal prominence: '$100 per widget' and '$103 per widget with 3% credit-card surcharge.'" *Expressions Hair Design*, 975 F. Supp. 2d at 443. Or it might attempt to comply with Section 518 by posting a single sticker price and then offering a cash discount, only to have its employees persistently tell customers that the discounted cash price is actually the "regular" price, and that using a credit-card costs "more," or "extra." Other possibilities surely abound. In any event, because Plaintiffs' submissions in this case do not suggest that they will ever be engaged in this hypothetical conduct, we assume, *arguendo*, that their references to such conduct amount to a facial attack on Section 518. Of course, our conclusion that Section 518 is constitutional as applied to single-sticker-price sellers means that the statute is not unconstitutional in "all of its applications," so the only kind of facial challenge that

remains available to Plaintiffs is an overbreadth challenge. *Wash. State Grange*, 552 U.S. at 449.

Both our precedent and Supreme Court precedent squarely hold that overbreadth challenges predicated on the chilling of commercial speech are not available under the First Amendment. *See Allstate Ins. Co. v. Serio*, 261 F.3d 143, 153 n.16 (2d Cir.), *certified question accepted*, 96 N.Y.2d 931 (2001), and *certified question answered*, 98 N.Y.2d 198 (2002); *see also Fox*, 492 U.S. at 481 ("Although it is true that overbreadth analysis does not normally apply to commercial speech, that means only that a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground—our reasoning being that commercial speech is more hardy, less likely to be 'chilled,' and not in need of surrogate litigators." (citations omitted)). But as several commentators have pointed out, in the years since *Fox*, commercial speech doctrine has undergone substantial changes. *See* Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 Geo. L.J. 497, 509–13 (2015) (observing that Supreme Court precedent since *Central Hudson* has appeared to take a progressively stricter approach to regulations of commercial speech); Troy L. Booher, *Scrutinizing Commercial Speech*, 15 Geo. Mason U. Civ. Rts. L.J. 69 (2004) (arguing that Supreme Court precedent in the years since *Fox* has gradually eroded the distinction between commercial and non-commercial speech, and thus undermined doctrinal differences predicated on that distinction). Our precedent remains clear that no such challenge is available here. Nevertheless, in an abundance of caution we assume, *arguendo*, the availability of such a challenge, and demonstrate that such availability would not alter the outcome of our decision. Indeed, the Supreme Court has

taken just this approach before. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 n. 20 (1978).

The First Amendment overbreadth doctrine "permits a defendant to make a facial challenge to an overly broad statute restricting speech, even if he himself has engaged in speech that could be regulated under a more narrowly drawn statute." *Alexander v. United States*, 509 U.S. 544, 555 (1993). This doctrine responds to the concern that "the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). However, because there are "obvious harmful effects" to facially invalidating a law "that in some of its applications is perfectly constitutional," courts "vigorously enforce[] the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008); *see, e.g., United States v. Farhane*, 634 F.3d 127, 136–37 (2d Cir. 2011); *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 335–36 (6th Cir. 2009) (en banc).

The primary problem with both Plaintiffs' as-applied challenge and their putative overbreadth challenge is that it is far from clear that Section 518 prohibits the relevant conduct in the first place. As noted earlier, the federal statute on which Section 518 was modeled was eventually revised to clarify that it did not, in fact, apply to sellers that did not post single sticker prices: it defined "regular price" as "the tag or posted price ... if a single price is tagged or posted, or the price ... when payment is made by use of [a credit card] if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of [a credit card] and the other when payment is made by use of cash, check, or similar means." 15 U.S.C.

§ 1602(y). Plaintiffs' argument that Section 518 extends outside the single-sticker-price context therefore depends on the assumption that Section 518 has a broader reach than the federal statute did. The parties, however, have not cited a single decision by a New York appellate court interpreting the scope of Section 518's prohibition. As we will explain, that dearth of authority dooms both of Plaintiffs' remaining challenges.

"When anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration" of whether a ruling on the constitutionality of the state law is, in fact, necessary. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). In particular, a well-established body of law—overlooked almost entirely by the parties and the district court in this case—exists to avoid the "friction-generating error" that can result when a federal court "endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Id.* at 79; *see Allstate Ins. Co.*, 261 F.3d at 150 ("Where a decision is to be made on the basis of state law, ... the Supreme Court has long shown a strong preference that the controlling interpretation of the relevant statute be given by state, rather than federal, courts."). The pathmarking precedent is *Pullman*, in which the Supreme Court held that federal courts should "abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 384 (2d Cir. 2000) (quoting *All. of Am. Insurers v. Cuomo*, 854 F.2d 591, 601 (2d Cir. 1988)); *see Pullman*, 312 U.S. at 500–01. After the federal court abstains, the parties may seek a controlling interpretation of the challenged law from the state courts, whose decision could cause the federal constitutional question to disappear altogether.

Accordingly, *Pullman* abstention allows federal courts to avoid both "(a) premature decisions on questions of federal constitutional law, and (b) erroneous rulings with respect to state law." *Serio,* 261 F.3d at 150.

The Supreme Court has long relied on the principles animating *Pullman* in the context of First Amendment overbreadth challenges. As noted, an overbreadth challenge cannot succeed unless the challenged statute's application to protected speech is "substantial" in comparison to its legitimate sweep. Not infrequently, the substantiality vel non of a statute's overbreadth will not be self-evident, and will instead depend on how the statute is interpreted. If a state statute is susceptible of multiple interpretations, one of which might render it overbroad and another of which would not, *Pullman's* logic suggests that the state courts—if they have not definitively construed the statute already—should be afforded the opportunity to adopt the narrower, less problematic interpretation. *See Tunick v. Safir,* 209 F.3d 67, 75–76 (2d Cir. 2000) (opinion of Calabresi, J.) (noting that state courts typically apply some version of the rule that a statute should be interpreted, if possible, so as to avoid constitutional doubts). Thus, in *Dombrowski v. Pfister,* the Supreme Court indicated that a state statute with a potentially "overbroad sweep" should not be invalidated in its entirety if a "readily apparent construction suggests itself" under which the state courts could eliminate any constitutional difficulty. 380 U.S. 479, 486, 491 (1965). The Court relied for this proposition on its earlier statement in *Baggett v. Bullitt*—a *Pullman* abstention case—that abstention is appropriate if the challenged state law is susceptible to an interpretation that, if adopted by the state courts, "would eliminate the constitutional issue and terminate the litigation." 377 U.S. 360, 377 (1964); *see Dombrowski,* 380 U.S. at 491; *see also* Michael C. Dorf, *Facial*

Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 287 (1994) ("[W]hen a federal court upholds a state statute against a facial challenge on the basis that the statute could be construed to avoid constitutional infirmities, the court, in effect, abstains from rendering a decision of state law pursuant to *Pullman*."); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 901–02 (1991) (similar).

The First Amendment principle recognized in *Dombrowski*—that a state law should not be struck down as substantially overbroad if a "readily apparent" narrowing construction is available—is not always explicitly acknowledged as an outgrowth of *Pullman* abstention. Nonetheless, federal courts have consistently reaffirmed that in considering an overbreadth challenge to a state statute, we must presume that the state courts will give the law a narrow construction so long as the law is "readily susceptible" to that construction. *Vt. Right to Life Comm.*, 221 F.3d at 386 (quoting *Am. Booksellers Ass'n*, 484 U.S. at 397); *see also, e.g.*, *Ferber*, 458 U.S. at 773 (rejecting an overbreadth challenge premised on the "assum[ption] that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to [its] proscription"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) ("[A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts, and its deterrent effect on legitimate expression is both real and substantial.") (citation omitted); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute."); Dorf, *supra*, at 287 ("[W]hen the validity of a statutory provision turns on its applicability to persons not before the court, the court need not presume that a state court would construe the statute in

an unconstitutional manner as applied to those persons."). This presumption in favor of state laws' constitutionality is consistent, moreover, with the Supreme Court's emphasis on "[e]xercising judicial restraint in ... facial challenge[s]" in order to avoid "premature interpretations of statutes in areas where their constitutional application might be cloudy." *Wash. State Grange*, 552 U.S. at 450 (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)).

Applying the foregoing principles to the case at hand, we conclude that neither portion of Plaintiffs' First Amendment challenge premised on Section 518's application outside the single-sticker-price context can succeed. In light of the fact that Section 518's enactment was driven by the expiration of the federal surcharge ban, it is entirely possible, if not likely, that New York courts would construe Section 518 as being identical to the lapsed federal ban. Certainly, we see nothing in Section 518's text that would foreclose such an interpretation: although the law lacks the federal statute's explicit definitions, the word "surcharge" itself, which means an additional amount above the seller's regular or usual price, may necessarily signal that the law simply does not apply in the absence of a single sticker price. *See Fulvio I*, 514 N.Y.S.2d at 596 ("While the term 'surcharge' is not precisely defined by the statute itself it retains its everyday, commonsense meaning...") (footnote omitted). New York courts, moreover, like most state and federal courts around the country, will generally interpret statutes so as to avoid constitutional difficulties.[12] *See All. of Am. Insurers v.*

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[12] To be clear, we do not intend to suggest that the First Amendment would, in fact, be violated even if Section 518 were held to have a broader reach than the lapsed federal surcharge ban. For the reasons given in the text, we do not address that question in this opinion. However, to frame the constitutional question that might

Chu, 571 N.E.2d 672, 678 (1991); *Turnick*, 209 F.3d at 76 (opinion of Calabresi, J.).

We therefore conclude that Section 518 is "readily susceptible," *Vt. Right to Life Comm.*, 221 F.3d at 386, to a narrowing construction that "would eliminate the constitutional issue and terminate [this] litigation," *Baggett*, 377 U.S. at 377. As a result, we cannot presume that Section 518 has any applications outside the single-sticker-price context at all—that is, any applications other than the ones we have already found to be constitutional. To put this point more emphatically, we cannot hold a duly enacted state law unconstitutional based entirely on speculation that the New York courts might give it an expansive and arguably problematic reading that its text does not require. This holding both defeats Plaintiffs' putative overbreadth challenge and (on the other side of the same coin) calls for abstention with respect to Plaintiffs' as-applied challenge. In other words, the fact that Section 518 is readily susceptible to the narrowing construction that New York has identified means that Plaintiffs' putative overbreadth challenge fails, because we must presume as a matter of law that New York state courts would adopt such a construction; and the fact that the New York courts have not yet

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arise, we note that "[i]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Whether Section 518 violates the First Amendment outside the single-sticker-price context would therefore appear to turn on whether its application would properly be viewed as involving the seller's speech itself or, instead, underlying conduct that happens to be evidenced by speech. *Cf., e.g., United States v. Caronia*, 703 F.3d 149, 160–63 (2d Cir. 2012).

addressed this interpretive question means that we must abstain from deciding Plaintiffs' as-applied challenge.

The district court suggested that the actions of the New York prosecutors described above, by demonstrating that Section 518 has been enforced in accordance with a broad interpretation, were "fatal" to New York's argument that Section 518 could be interpreted consistently with the lapsed federal ban. *Expressions Hair Design*, 975 F. Supp. 2d at 444. This was clear error. One reported prosecution and one set of threatened prosecutions by the state's executive branch shed little light, if any, on how the New York Court of Appeals would construe Section 518; the state prosecutors could easily have been mistaken as to the law's true breadth. *See Stenberg v. Carhart*, 530 U.S. 914, 941 (2000) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." (alteration in original) (quoting *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment))); *Arizonans for Official English*, 520 U.S. at 79 (noting the risk of federal courts' premising their constitutional rulings on interpretations of state statutes "not yet reviewed by the *State's highest court*" (emphasis added)). While the non-judicial precedents cited by the district court—as well as the linguistic differences between the texts—make it arguable that New York courts *could* interpret the law to have a broader reach than the federal predecessor statute,[13] we decline to speculate as to which reading the state courts will adopt.

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[13] Indeed, although New York invites us to construe Section 518 as being identical to its lapsed federal counterpart if necessary to avoid constitutional difficulties, it never quite abandons the position that Section 518 might apply in the absence of a single sticker price. *See* Appellants' Br. at 61 (noting that a seller's regular price will be

We also decline to certify to the New York Court of Appeals the question whether Section 518 applies to Expressions Hair Design's dual-price scheme.[14] We recognize that "[c]ertification today covers territory once dominated by ... '*Pullman* abstention.'" *Arizonans for Official English*, 520 U.S. at 75. Whereas *Pullman* abstention "entail[s] a full round of litigation in the state court system before any resumption of proceedings in federal court," certification "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Id.* at 76; *see also Bellotti v. Baird*, 428 U.S. 132, 150–51 (1976); *Osterweil*, 706 F.3d at 144–45. Because of these advantages, this Court has noted that it will generally be preferable "to certify, rather than abstain, wherever it would 'serve the same purpose [as *Pullman*] more efficiently.'" *Nicholson*, 344 F.3d at 168 (alteration in original) (quoting *Serio*, 261

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its "single posted price" in "the vast majority of cases," but "can also be determined through evidence of how the seller calculates its usual costs and desired profit margins").

[14] In a pure overbreadth challenge based on a statute's application to hypothetical situations not before the court, a determination that the statute is readily susceptible to an interpretation under which it would not cover the hypothetical situations might well end the litigation regardless of the possibility of certification. *See Am. Booksellers Ass'n*, 484 U.S. at 397 ("[I]n determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, *it will be upheld*.") (emphasis added). In such a case, the application of the statute to the challenger's conduct should be clear, *see Fox*, 492 U.S. at 484–85, 109 S.Ct. 3028, and we doubt the appropriateness of asking state courts purely hypothetical questions. So to the extent that certification might be appropriate here— which, in any event, we conclude that it is not—it would be appropriate only with respect to Plaintiffs' as-applied challenge.

F.3d at 155 (Walker, C.J., concurring)). Still, certification is not "obligatory" even if available, and the decision whether to certify or abstain "rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

Here, we believe that certification is not preferable, primarily because of the way in which this case has been litigated. Were we to certify, Plaintiffs' challenge would be definitively resolved if the New York Court of Appeals were to interpret Section 518 consistently with the lapsed federal surcharge ban. But if the Court of Appeals were to give the statute a different construction, two key questions would remain: (1) whether the statute applies to Expressions Hair Design specifically (a question of state law that we would presumably ask the Court of Appeals to answer), and (2) if so, whether that application violates the First Amendment (a question of federal law that we would answer). Both questions would likely prove difficult in light of the present state of the record, since this case has been litigated almost entirely on the pleadings and the parties have focused their legal analysis primarily on Section 518's application to single-sticker-price sellers. And, in determining whether a seller that posts separate cash and credit-card prices has actually been imposing a forbidden credit-card surcharge, a particularized understanding of how the seller displays its prices and communicates with customers would seem especially important. We will not burden the Court of Appeals with questions that potentially cannot be answered without additional factual development.[15] *Cf. Scribner v. Summers*, 138 F.3d 471,

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[15] Indeed, federal courts themselves have declined to consider pre-enforcement as-applied challenges that lack an adequate "foundation." *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 127 (2d Cir. 2014) (quoting *Ctr. for Individual Freedom v. Madigan*,

473 (2d Cir. 1998) ("[W]e would be inclined to certify the question to the New York Court of Appeals should the question be presented on an appropriate record."). Because additional development of the record would be necessary, moreover, one of the primary benefits that certification enjoys over *Pullman* abstention—eliminating the delay and cost of litigating anew in state court—is not as weighty here. Finally, we think there is a minimal risk that any First Amendment rights Expressions Hair Design may be exercising will be compromised by our decision to abstain. It has employed its dual-price scheme without being prosecuted thus far, and New York has, in this case, effectively disavowed any interpretation of Section 518 under which dual-price sellers will be prosecuted simply because their employees happen to *refer* to their pricing schemes as involving a "surcharge."

* * *

In sum: Section 518 does not violate the First Amendment as applied to single-sticker-price sellers. And, because it is unclear whether the law applies outside that specific context, there is no basis for us to conclude that the law violates the First Amendment in any of its applications, much less on its face. As the foregoing discussion illustrates, federal courts can occasionally be an unwise choice of forum for plaintiffs seeking the pre-enforcement invalidation of disfavored state laws. "[R]espect for the place of the States in our federal system" requires no less. *Arizonans for Official English*, 520 U.S. at 75.

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697 F.3d 464, 475 (7th Cir. 2012)); *see also Justice v. Hosemann*, 771 F.3d 285, 292–95 (5th Cir. 2014); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1022 (9th Cir. 2010).

II.

The district court also erred in holding that Section 518 is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment. A law is void for vagueness if it either (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) lacks "explicit standards for those who apply [it]." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186–87, 191 (2d Cir. 2010) (alteration in original) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000), and *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir. 2007)).[16] A vagueness challenge may be either facial or as-applied. *See Farrell v. Burke*, 449 F.3d 470, 495 & n.11 (2d Cir. 2006). Again, we construe Plaintiffs' submissions as raising a facial challenge to Section 518, as well as an as-applied challenge concerning the statute's application to two specific pricing schemes: (1) the single-sticker-price scheme that Plaintiffs say they would like to employ and (2) the dual-price scheme employed by Expressions Hair Design. These challenges fail for essentially the same reasons as Plaintiffs' First Amendment challenges.

Under traditional standards governing facial vagueness challenges, a law is facially unconstitutional only if it is "impermissibly vague in all of its applications." *Vill. of Hoffman Estates v. Flipside*,

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[16] The Due Process Clause requires "a greater degree of specificity" where the challenged statute is "capable of reaching expression sheltered by the First Amendment." *VIP of Berlin*, 593 F.3d at 186 (quoting *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006)); see *Smith v. Goguen*, 415 U.S. 566, 573 (1974). Consistent with their argument that Section 518 regulates "pure speech," Plaintiffs contend that this heightened specificity requirement applies in this case. Because we would reject Plaintiffs' challenge regardless of which standard applies, we assume they are correct.

Hoffman Estates, Inc., 455 U.S. 489, 497 (1982). Thus, "if a statute has a core meaning that can reasonably be understood, then it may validly be applied to conduct within the core meaning, and the possibility of such a valid application necessarily means that the statute is not vague on its face." *Brache v. Westchester County*, 658 F.2d 47, 51 (2d Cir. 1981); *see also Cunney v. Bd. of Trs. of Vill. of Grand View*, 660 F.3d 612, 623 (2d Cir. 2011).

Here, Section 518 plainly has a "core meaning that can reasonably be understood": sellers who post single sticker prices for their goods and services may not charge credit-card customers an additional amount above the sticker price that is not also charged to cash customers. In other words, Section 518's core meaning is identical to the scope of the lapsed federal surcharge ban. This conclusion follows directly from Section 518's use of the word "surcharge," which means an additional charge above the usual price. We have complete confidence that sellers "of ordinary intelligence" will—if they post single sticker prices—readily understand how to avoid imposing a credit-card surcharge, and that New York authorities will have sufficient guidance in determining whether such sellers have violated the law. Accordingly, Section 518 may validly be applied to single-sticker-price sellers without violating the Due Process Clause; and under the traditional standards governing facial challenges, that means that the statute is not unconstitutionally vague on its face. *See Brache*, 658 F.2d at 51. In other words, Plaintiffs' as-applied challenge involving single-sticker-price sellers fails, so under traditional standards, their facial challenge fails as well. *See Farrell*, 449 F.3d at 485 (noting that "the permissibility of a facial challenge sometimes depends upon whether the challenged regulation was constitutional as applied to the plaintiff").

The Supreme Court has suggested, however, that another variety of facial vagueness challenge—akin to a First Amendment overbreadth challenge—may be available "in the First Amendment context." *United States v. Williams*, 553 U.S. 285, 304 (2008). In First Amendment cases, the Court has said, "[f]acial vagueness challenges may go forward ... if the challenged regulation 'reaches a substantial amount of constitutionally protected conduct,'" even if it is not unconstitutionally vague as applied to the challenger. *Farrell*, 449 F.3d at 496 (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983)). This formulation is slightly perplexing, largely because the scope of the challenged law is precisely what is at issue in a vagueness challenge. Here, for example, Plaintiffs argue that it is unclear how far Section 518 extends, and thus how much (allegedly) "constitutionally protected conduct" the law reaches. The relevant question, then, appears to be how much constitutionally protected conduct the law *arguably* reaches—that is, whether the law's vagueness will result in "a substantial chilling effect on protected conduct." *Id.* at 497; *see Williams*, 553 U.S. at 304 (explaining that plaintiffs are "permitt[ed] ... to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech"); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (stating that a facial vagueness challenge is available if "the statute's deterrent effect on legitimate expression is ... 'both real and substantial'" (quoting *Erznoznik*, 422 U.S. at 216)). Without reaching the question whether this species of facial vagueness challenge is otherwise applicable in this context, we agree with New York that Section 518 is readily susceptible to an interpretation under which it would clearly reach *no* constitutionally protected conduct

and therefore lack any meaningful chilling effect on such conduct.[17]

A statute is unconstitutionally vague only if it cannot be construed in a way that eliminates the vagueness problem. *See Skilling v. United States*, 561 U.S. 358, 403–04 (2010); *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[C]larity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute...."). Thus, in considering a vagueness challenge to a state statute, a federal court must consider not only how the law is "presently drafted," but also how it has been "construed by the state courts." *Kolender*, 461 U.S. at 358; *see Wainwright v. Stone*, 414 U.S. 21, 22–23 (1973) ("For the purpose of determining whether a statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.'" (quoting

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[17] The Supreme Court recently signaled another arguable departure from the traditional rule that, outside the First Amendment context, a statute is facially invalid only if it is unconstitutionally vague in all of its applications. In *Johnson v. United States*, the Court held that the so-called "residual clause" of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B), was void for vagueness despite the existence of "straightforward cases" in which the clause's application would be clear. 135 S. Ct. 2551, 2560, (2015); *see id.* at 2580–82 (Alito, J., dissenting) (objecting to this aspect of the majority's reasoning). The Court did not articulate a standard for the percentage of cases in which a law's application must be vague in order for it to be facially unconstitutional. A plurality of the Court previously held that under certain circumstances, a statute may be facially unconstitutional if "vagueness permeates [its] text." *United States v. Rybicki*, 354 F.3d 124, 131 (2d Cir. 2003) (en banc) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (plurality opinion)). We need not decide on the correct standard, however, because the narrowing construction described in the text would leave Section 518 with very few, if any, unconstitutionally vague applications.

Minnesota ex rel. Pearson v. Prob. Court, 309 U.S. 270, 273 (1940))). And, just as in the First Amendment overbreadth context, if an allegedly vague state law has not yet been construed by the state courts, a federal court must determine whether the law is "reasonably susceptible of constructions that might undercut or modify [the] vagueness attack." *Greater N.Y. Metro. Food Council v. McGuire*, 6 F.3d 75, 77 (2d Cir. 1993) (per curiam) (alteration in original) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 307 (1979)). If the law is susceptible to such a construction, then the federal court should "abstain to afford the state courts a reasonable opportunity to construe the statute." *Id.*

If the New York courts interpret Section 518 as being identical to the lapsed federal surcharge ban, then the law (as construed) would not be unconstitutionally vague on its face, and it clearly would not apply to dual-price sellers like Expressions Hair Design regardless of what those sellers' employees might say about their pricing schemes. Accordingly, having concluded that Section 518 enjoys a core set of applications in which it is not unconstitutionally vague—namely, its application to sellers who post single sticker prices—we find abstention appropriate in this context also, and therefore do not reach the balance of Plaintiffs' vagueness challenge.

CONCLUSION

We have considered Plaintiffs' remaining arguments and find them to be without merit. For the foregoing reasons, we **VACATE** the judgment below and **REMAND** for the dismissal of Plaintiffs' claims.

APPENDIX B

United States Court of Appeals,
Second Circuit

Nos. 13–4533, 13–4537

EXPRESSIONS HAIR DESIGN, Linda Fiacco, The Brooklyn Farmacy & Soda Fountain, Inc., Peter Freeman, Bunda Starr Corp., Donna Pabst, Five Points Academy, Steve Milles, Patio.com LLC, David Ross,
Plaintiffs–Appellees,

v.

Eric T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, Charles J. Hynes, in his official capacity as District Attorney of Kings County,
Defendants–Appellants.

November 20, 2015

Errata Sheet for Opinion Dated September 29, 2015

Expressions Hair Design, et al. v. Schneiderman, et al.,
Nos. 13-4533, 13-4537
Argued: March 5, 2015
Decided: September 29, 2015

ERRATA

PAGE (of slip op)	LINE	DELETE	INSERT
4	7–10	On appeal, we conclude that Section 518 violates neither the First Amendment nor the Due Process Clause, and we therefore vacate the judgment entered by the district court and remand for dismissal of Plaintiffs' claims.	On appeal, we conclude that the application of Section 518's text to surcharges added to single sticker prices violates neither the First Amendment nor the Due Process Clause. We further decline to address other applications, invoking *Pullman* abstention. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). We therefore vacate the judgment entered by the district court and remand for dismissal of Plaintiffs' claims.

APPENDIX C

In the United States District Court
for the Southern District of New York

EXPRESSIONS HAIR DESIGN, Linda Fiacco, The Brooklyn Farmacy & Soda Fountain, Inc., Peter Freeman, Bunda Starr Corp., Donna Pabst, Five Points Academy, Steve Milles, Patio.com LLC, David Ross,
Plaintiffs,

v.

Eric T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, Charles J. Hynes, in his official capacity as District Attorney of Kings County, and Gerald F. Mollen, in his official capacity as District Attorney of Broome County,
Defendants.

13-cv-3775 (JSR)

November 4, 2013

STIPULATED FINAL JUDGMENT AND PERMANENT INJUNCTION

JED S. RAKOFF, District Judge.

The plaintiffs, Expressions Hair Design, Linda Fiacco, The Brooklyn Farmacy & Soda Fountain, Inc., Peter Freeman, Bunda Starr Corp., Donna Pabst, Five Points Academy, Steve Milles, *Patio.com* LLC, and David Ross, and the defendants, Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, Charles J. Hynes, in his official capacity as District Attorney of Kings County, and Gerald F. Mollen, in his official capacity as District Attorney of Broome County, by their undersigned counsel, hereby agree and stipulate, subject to Court approval, as follows:

WHEREAS, the plaintiffs filed their complaint on June 4, 2013, claiming that New York General Business Law § 518 violates their First Amendment rights to free speech, is unconstitutionally vague in violation of their Fourteenth Amendment due process rights, and is preempted by the Sherman Antitrust Act;

WHEREAS, the plaintiffs filed a motion for a preliminary injunction on June 17, 2013, seeking an injunction prohibiting the attorney general from enforcing § 518 against them on the ground that it would violate their right to free speech under the First Amendment and would be unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment;

WHEREAS, the attorney general moved to dismiss the complaint on July 12, 2013;

WHEREAS, the plaintiffs filed a first amended complaint on July 15, 2013, adding as defendants district attorneys Vance, Hynes, and Mollen;

WHEREAS, the Court, on consent of the parties, deemed the attorney general's motion to dismiss to be directed against the first amended complaint on July 31, 2013;

WHEREAS, the district attorneys joined in the attorney general's motion to dismiss, as well as the attorney general's opposition to the plaintiffs' motion for a preliminary injunction, on August 7, 2013;

WHEREAS, the Court, on consent of the parties, deemed the plaintiffs' motion for a preliminary injunction to be directed not only against the attorney general, but also against the district attorneys;

WHEREAS, the Court, in an opinion and order dated October 3, 2013, granted the plaintiffs' motion for a preliminary injunction and denied the defendants' motion to dismiss;

WHEREAS, the entry of final judgment on the plaintiffs' First Amendment and Fourteenth Amendment claims now will expedite appellate review of the District Court's determination as to the constitutionality of a state law and eliminate the need for further litigation;

NOW, THEREFORE, it is hereby stipulated and agreed that:

(a) There is no just reason for delay of entry of a final judgment on the plaintiffs' First Amendment and Fourteenth Amendment claims pursuant to Rule 54(b). These constitutional claims present legal issues that are independent of the plaintiffs' antitrust preemption claim, which the Court concluded must be subjected to a fact-intensive rule of reason analysis. Moreover, the parties have a strong interest in expediting the litigation on the First and Fourteenth Amendment claims. Because the

plaintiffs will not pursue their antitrust preemption claim if they prevail on their constitutional claims, an immediate appeal of these constitutional claims may avert further litigation on the antitrust claim, thereby avoiding the high costs of fact and expert discovery, motion practice, and potentially a trial. Entry of a final judgment on the First Amendment and Fourteenth Amendment claims therefore will be efficient and fair for the court and the parties.

(b) For the reasons given in the Court's October 3, 2013 opinion and order, the Court grants the following declaratory relief to the plaintiffs before the Court: The Court declares that New York General Business Law § 518 violates the First Amendment and is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment;

(c) For the reasons given in the Court's October 3, 2013 opinion and order, the Court permanently enjoins the defendants from enforcing New York General Business Law § 518 against the plaintiffs;

(d) The defendants reserve their right to appeal this stipulated final judgment, declaration, and permanent injunction;

(e) In light of the relief described above, the Court dismisses the plaintiffs' antitrust preemption claim as moot, without prejudice to the plaintiffs' right to revive that claim if this stipulated final judgment is reversed on appeal; and

(f) Pursuant to Federal Rule of Civil Procedure 54(d), a motion by any party for attorneys' fees, related nontaxable expenses, or costs shall be filed no later than 30 days after the expiration of the period for appeal or, in the event of an appeal, shall be filed within 30 days of the judgment of the court of appeals

or the final judgment of this Court on remand, whichever is later.

STIPULATED AND AGREED BY:

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IT IS ORDERED THAT:

(a) This stipulated final judgment is hereby granted;

(b) The judgment in favor of plaintiffs rendered by the Court in this stipulated final judgment shall be entered as a final judgment and the clerk is directed to enter such judgment immediately; and

(c) It is expressly determined that there is no just reason for delay in this entry of a final judgment on the plaintiffs' First Amendment and Fourteenth Amendment claims pursuant to Rule 54(b). These constitutional claims present legal issues that are independent of the plaintiffs' antitrust preemption claim, which is subject to a fact-intensive rule of reason analysis. An immediate appeal of these constitutional claims may avert further litigation on the antitrust preemption claim, thereby avoiding the high costs of fact and expert discovery, motion practice, and potentially a trial. Entry of a final judgment on the First Amendment and Fourteenth Amendment claims therefore will be efficient and fair for the court and the parties.

APPENDIX D

In the United States District Court
for the Southern District of New York

EXPRESSIONS HAIR DESIGN, Linda Fiacco, The Brooklyn Farmacy & Soda Fountain, Inc., Peter Freeman, Bunda Starr Corp., Donna Pabst, Five Points Academy, Steve Milles, Patio.com LLC, David Ross,
Plaintiffs,

v.

Eric T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, Charles J. Hynes, in his official capacity as District Attorney of Kings County, and Gerald F. Mollen, in his official capacity as District Attorney of Broome County,
Defendants.

13-cv-3775 (JSR)

October 3, 2013

PRELIMINARY INJUNCTION, OPINION, AND ORDER

JED S. RAKOFF, District Judge.

Alice in Wonderland has nothing on section 518 of the New York General Business Law. Under the most plausible interpretation of that section, if a vendor is willing to sell a product for $100 cash but charges $102 when the purchaser pays with a credit card, the vendor risks prosecution if it tells the purchaser that the vendor is adding a 2% surcharge because the credit card companies charge the vendor a 2% "swipe fee." But if, instead, the vendor tells the purchaser that its regular price for the product is $102, but that it is willing to give the purchaser a $2 discount if the purchaser pays cash, compliance with section 518 is achieved. As discussed below, this virtually incomprehensible distinction between what a vendor can and cannot tell its customers offends the First Amendment and renders section 518 unconstitutional.

The instant action is brought by five retailers and their principals against the Attorney General of the State of New York and the District Attorneys of New York, Kings, and Broome Counties challenging the constitutionality of section 518 of the New York General Business Law. That statute prohibits a seller from imposing a "surcharge" on customers who elect to pay with a credit card, rather than by cash, check, or other similar means, *see* N.Y. Gen. Bus. Law § 518, and has been applied so as to prohibit retailers from informing their customers that the fees they pay to credit card companies and then pass on to their customers are in the nature of surcharges above the price they would otherwise charge. Plaintiffs wish to impose surcharges on credit-card transactions and to so inform their customers, but are constrained from doing so by section 518, which they assert violates the First Amendment, is unconstitutionally vague, and also is preempted by the Sherman Antitrust Act. Pending before the Court are

plaintiffs' motion for a preliminary injunction based on the First Amendment and vagueness challenges and defendants' cross-motion to dismiss the complaint in its entirety. For the reasons that follow, plaintiffs' motion is granted, and defendants' motion is denied.

Section 518 provides: "No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." *Id.* Violations of this prohibition carry criminal penalties: "any seller who violates [section 518] shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or a term of imprisonment up to one year, or both." *Id.* Criminal prosecutions under section 518 are brought by the appropriate county District Attorney. *See* N.Y. County Law §§ 700, 927. In addition, the New York Attorney General is authorized to bring civil enforcement actions to enjoin "continuous" violations of the statute, N.Y. Gen. Bus. Law § 513, and to seek restitution, damages, and cancellation of business licenses against "repeat[]" or "persistent" offenders, N.Y. Exec. Law § 63(12).

Section 518 by its terms only prohibits credit-card "surcharge[s]," and all parties here agree that the statute does not bar sellers from offering an equivalent "discount" to consumers who use cash.[1] In terms of their immediate economic consequences, surcharges and discounts are merely different labels for the same thing—a price difference between cash and credit. A number of studies have indicated, however, that consumers perceive credit-card surcharges negatively as a kind of loss or penalty, while cash discounts are perceived positively as a kind of gain or bonus. *See*

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[1] For convenience, and following the parties' usage, the Court hereinafter refers to all non-credit forms of payment as "cash."

generally Daniel Kahneman, Jack L. Knetch & Richard H. Thaler, Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias, 5 J. Econ. Persp. 193, 199 (1991); Adam Levitan, The Antitrust Super Bowl: America's Payment Systems, No–Surcharge rules, and the Hidden Costs of Credit, 3 Berkeley Bus. L.J. 265, 280–81 (2006); *see also* S. Rep. No. 97–23, at 3 ("The [U.S. Senate Banking] Committee recognizes that while discounts for cash and surcharges on credit cards may be mathematically the same, their practical effect and the impact they may have on consumers is very different.").

The parties draw very different conclusions about the impact these varying consumer reactions have on the financial relations between buyers, sellers, and third-party credit providers. Plaintiffs claim that framing the incremental cost of credit-card usage as a "surcharge" is an accurate and effective way to convey to consumers that paying with credit is actually more expensive than paying with cash. Absent surcharges, consumers may be unaware that when they use a credit card, the relevant credit card company charges the retailer a fee, usually around two to three percent of the sales price. *See, e.g.*, Decl. of Linda Fiacco ("Fiacco Decl.") ¶ 3; FAC ¶ 7. Such fees, known as "swipe fees," are among greatest and fastest growing operating expenses for merchants in some industries. *See* Adam J. Levitin, Priceless? The Economic Costs of Credit Card Merchant Restraints, 55 UCLA L. Rev. 1321, 1345 (2008); FAC ¶ 28. Plaintiffs accordingly want to impose credit card surcharges, rather than give cash discounts, and to so inform their customers, precisely because consumers are more likely then to notice the fees, dislike them, and switch to cash in order to avoid them. Over time, this behavior will place downward pressure on swipe fees, which credit card companies will be forced to reduce in order to prevent more and more consumers from switching to

cash. *See* Levitan, The Antitrust Super Bowl, *supra*, at 313 (noting that after surcharges were permitted in Australia and customers were notified of same, swipe fees there declined significantly); FAC ¶ 27.

Plaintiffs also argue that, in the absence of being able to impose surcharges and label them as such, some retailers cannot effectively call consumers' attention to the price differences between cash and credit, and therefore must charge higher headline prices for everyone. Surcharge bans like section 518 thus in effect force cash users (who are said to be disproportionately poor and minority persons), to subsidize the retail purchases of credit card users. *See* Adam J. Levitin, Priceless? The Social Costs of Credit Card Merchant Restraints, 45 Harv. J. on Legis. 1, 35 (2008); FAC ¶¶ 28–29. This hidden, regressive subsidy for credit card usage is not insubstantial. *See* Scott Schuh, Oz Shy, & Joanna Stavins, Who Gains and Who Loses from Credit Card Payments? at 21 (Fed. Reserve Bank of Boston, Public Policy Discussion Paper No. 10–03, 2010) ("The average cash-paying household transfers $149 ... annually to card users," each of whom on average "receives a subsidy of $1,333 ... annually from cash users.").

Defendants, however, contend that, in enacting section 518, the New York legislature effectively concluded that a surcharge ban would actually protect consumers from unfair surprise and deception. Defendants note that consumers tend to plan and anchor their expectations around the advertised sticker price of a given item they intend to purchase. If a consumer later learns that she can earn a discount from that price for using cash, she is not harmed. But if the consumer later learns that there is an additional charge, above the sticker price, if she chooses to pay by credit card, her expectations may be frustrated.

Whatever its purported purpose, section 518 is the product of a decades-long battle between credit card companies on the one hand and retailers and consumer advocates on the other. In the early days of credit cards, credit card companies included clauses in their contracts with retailers that strictly forbade those retailers from charging different prices for cash and credit transactions. *See* Edmund W. Kitch, The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?, 6 J.L. Econ. & Org. 217, 219–20 & n.4 (1990); FAC ¶ 32. That practice ended in 1974 when Congress amended the Truth in Lending Act to provide that a "card issuer may not, by contract or otherwise, prohibit any ... seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card." Fair Credit Billing Act, Pub. L. No. 93–495, tit. III, § 306, 88 Stat. 1500, 1515 (1974) (codified at 15 U.S.C. § 1666f(a)).

Thereafter, the battleground moved from whether merchants could charge different prices for cash and credit to how merchants could communicate those different prices to consumers. In 1976, at the urging of the credit card industry, Congress passed another amendment to the Truth in Lending Act, providing, as section 518 now provides, that "[n]o seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means." Act of Feb. 27, 1976, Pub. L. No. 94–222, § 3(c), 90 Stat. 197, 197 (codified at 15 U.S.C. § 1666f(a) (1980)). In this 1976 amendment, Congress defined the terms "discount" (as used in the preexisting version of the Act) and "surcharge" (as used in the amendment) as follows:

> The term "discount" ... means a reduction made from the regular price. The term "discount" ... shall not mean a surcharge.
>
> ... The term "surcharge" ... means any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means.

Id. § 3(a) (codified at 15 U.S.C. § 1602 (1980)).

The 1976 amendment placed a three-year time limit on the no surcharge provision, but in 1978, Congress extended the provision for an additional two years. *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95–630, § 1501, 92 Stat. 3641, 3713. In 1981, with the support of the credit card industry and over the opposition of federal regulators, Congress again extended the sunset for another three years. *See* Cash Discount Act, Pub. L. No. 97–25, § 201, 95 Stat. 144, 144; S. Rep. No. 97–23, at 8–10 (additional views of Sen. Proxmire) (describing the positions of credit card companies and federal regulators). In addition, supplementing the provisions that had defined "discount" and "surcharge" in terms of the retailer's "regular price," the 1981 renewal added a provision defining "regular price" as follows:

> the term "regular price" means the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of ... a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of ... a credit card and the other when payment is made by use of cash, check, or similar means.

Cash Discount Act § 102. This definition was intended to clarify that the no-surcharge provision "permits merchants to have two-tier pricing systems and to offer a differential between the credit price and the cash price" as long as merchants ensure that "when prices are tagged or posted, the consumers will be exposed to the highest price when they see a tagged or posted price." S. Rep. No. 97–23, at 4.

In 1984, however, Congress allowed the no-surcharge provision to lapse. In response, the credit card industry began lobbying for state-level no-surcharge laws, which were eventually enacted in ten states, including New York. *See* N.Y. Bus. Law § 518.[2] New York's no-surcharge provision, section 518, copied the operative text of the then-lapsed federal provision prohibiting surcharges, but did not include the federal definitions, or any other definitions, of "discount," "surcharge," or "regular price."

Contemporaneously, credit card companies also began including contractual no-surcharge provisions in their agreements with retailers. *See* Amos Tversky & Daniel Kahneman, Rational Choice and the Framing of Decisions, 59 J. Bus. S251, S261 (1986); FAC ¶¶ 34, 43. In January 2013, however, two major credit card issuers, Visa and MasterCard, agreed to drop their contractual prohibitions against surcharges as part of a larger antitrust settlement. *See* Jessica Silver–Greenberg, Visa and MasterCard Settle Claims of Antitrust, N.Y. Times, July 14, 2012, at B1; FAC ¶ 48. As a result, state no-surcharge laws, previously redundant of retailers'

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[2] *See also* Cal. Civ. Code § 1748.1(a); Colo. Rev. Stat. § 5–2–212(1); Conn. Gen. Stat. § 42–133ff(a); Fla. Stat. § 501.0117; Kan Stat. Ann. § 16a–2–403; Me. Rev. Stat. 9–A, § 8–303(2) (repealed Sept. 27, 2011); Mass Gen. Laws ch. 140D, § 28A(a); Okla. Stat. tit. 14a, § 2–211(A); Tex. Fin. Code § 339.001.

contractual obligations, have now taken on renewed importance.

The ten plaintiffs in this case consist of five New York retail businesses and their principals. All of these businesses pay swipe fees of around two-to-three percent per credit transaction, and accordingly would like to charge higher prices for credit transactions than for cash. They do not want to frame this price difference as a cash discount, however, because, *inter alia*, discounts "would make advertised prices look higher than they are, without making it transparent that the higher price would be due solely to credit card transaction costs—precisely the information [they] wish to convey to [their] consumers." Decl. of Peter Freeman Decl. ("Freeman Decl.") ¶ 8; Decl. of Donna Pabst ("Pabst Decl.") ¶ 5 (similar); Decl. of David Ross ("Ross Decl.") ¶¶ 8–9 (similar); Fiacco Decl. ¶¶ 5–8; Decl. of Stephen Milles ("Milles Decl.") ¶¶ 5–6; FAC ¶¶ 2–4, 7, 10, 13, 16. Given section 518, however, plaintiffs fear that they may be sued or even prosecuted if they frame any price difference as imposing a "surcharge" or otherwise convey to their customers that they will be charged *more* for paying with credit rather than *less* for paying with cash. *See* Freeman Decl. ¶ 9; Pabst Decl. ¶ 6; Ross Decl. ¶ 10; Fiacco Decl. ¶¶ 8–9; Milles Decl. ¶¶ 6–7; FAC ¶¶ 4–5, 8, 11, 13, 16.

Because of these fears, moreover, four of the five plaintiff businesses simply charge the same price for all transactions, even though they would like to charge more for credit. *See* Freeman Decl. ¶ 6; Pabst Decl. ¶ 5; Ross Decl. ¶ 7; Milles Decl. ¶ 4; FAC ¶¶ 7, 11, 13, 16. The remaining business, Expressions Hair Design ("Expressions"), a unisex hair salon in Vestal, New York, does charge different prices for cash and credit, but section 518 effectively restricts how it describes those prices to its customers. According to the salon's co-

owner plaintiff Linda Fiacco, "[u]ntil 2012, Expressions posted a sign at our counter informing all customers that, due to the high swipe fees charged by the credit-card industry, we would charge them 3% more for using a credit card to purchase services." Fiacco Decl. ¶ 6; *see* FAC ¶ 3. However, after a customer who is a lawyer informed the salon of New York's no-surcharge law, Expressions removed the sign. Fiacco Decl. ¶ 6; FAC ¶ 3. Expressions still charges a higher price for credit, but because of section 518, the salon's managers and employees "try to be as careful as we can to avoid characterizing that price difference as a 'surcharge' or an 'extra' charge for paying with a credit card," as opposed to a discount for cash. Fiacco Decl. ¶ 7; *see* FAC ¶ 5. Fiacco states that Expressions would like to return to its former policy of prominently advertising a surcharge on all credit transactions, but cannot because of fears of being prosecuted or sued for violation of section 518. Fiacco Decl. ¶ 8; FAC ¶ 4.

Against this background, the Court turns to plaintiffs' motion for a preliminary injunction on its First Amendment and void-for-vagueness claims and defendants' cross-motion to dismiss the complaint in its entirety.[3]

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[3] In their initial complaint, plaintiffs named only the Attorney General as a defendant, but later amended their complaint to name the three District Attorneys as well. *See generally* Compl.; FAC. Before plaintiffs filed their amended complaint, however, the Attorney General moved to dismiss the initial complaint. On consent of the parties, the Court later deemed the motion to dismiss to be directed against the First Amended Complaint. *See* Order of July 31, 2013. Also on consent of the parties, the Court deemed plaintiffs' motion for a preliminary injunction to be directed not only against the Attorney General, but also against the District Attorneys. *See* Order of August 14, 2013. The District Attorneys joined in the Attorney General's motion to dismiss, as well as his opposition to the

Regarding plaintiffs' motion, a plaintiff seeking a preliminary injunction must ordinarily show "1) irreparable harm absent injunctive relief; 2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and 3) that the public's interest weighs in favor of granting an injunction." *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010) (internal quotation marks and citations omitted). However, "[w]hen, as here, the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard." *Id.*

As for defendants' motion, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A court considering a motion to dismiss must "accept[] as true all factual claims in the complaint and draw[] all reasonable inferences in the plaintiff's favor." *Fink v. Time Warner Cable*, 714 F.3d 739, 740–41 (2d Cir. 2013).

Before applying these standards to the motions at hand, the Court must first address defendants' threshold argument that certain plaintiffs lack Article III standing and that plaintiffs' entire pre-enforcement challenge to section 518 is not ripe for adjudication. As to standing, Article III of the Constitution limits federal courts' jurisdiction to "Cases" and "Controversies," and "[o]ne element of the case-or-controversy requirement is that

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motion for a preliminary injunction.

plaintiffs must establish that they have standing to sue." *Clapper v. Amnesty Int'l USA*133 S. Ct. 1138, 1146 (2013) (internal quotation marks omitted). This constitutional requirement demands that

> (1) the plaintiff have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical, (2) the injury be fairly traceable to the challenged action of the defendant, and (3) it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Hedges v. Obama, 724 F.3d 170, 188 (2d Cir. 2013) (internal quotation marks omitted).

The closely related doctrine of ripeness has both constitutional and prudential aspects. "To the extent that issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy,' a conclusion that the complaining party will sustain immediate injury and that such injury would be redressed by the relief requested would appear to satisfy this constitutional requirement." *Simmonds v. I.N.S.*, 326 F.3d 351, 358 (2d Cir. 2003) (internal quotation marks and alterations omitted). As a prudential matter, courts also consider "(1) whether an issue is fit for judicial decision and (2) whether and to what extent the parties will endure hardship if decision is withheld." *Id.* at 359.

That said, courts "assess pre-enforcement First Amendment claims ... under somewhat relaxed standing and ripeness rules." *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013). Void-for-vagueness claims grounded in First Amendment concerns receive similar treatment. *See Dickerson v. Napolitano*, 604 F.3d 732, 742 (2d Cir. 2010). As the Second Circuit has explained, "plaintiffs contesting

statutes or regulations on First Amendment grounds face an unattractive set of options if they are barred from bringing a facial challenge: refrain[] from activity they believe the First Amendment protects, or risk civil or criminal penalties for violating the challenged law." *Nat'l Org. for Marriage*, 714 F.3d at 689 (internal quotation marks omitted). Accordingly, in order to satisfy the requirements of standing and ripeness, "[a] plaintiff bringing a pre-enforcement facial challenge against a statute need not demonstrate to a certainty that it will be prosecuted under the statute to show injury, but only that it has an actual and well-founded fear that the law will be enforced against it." *Id.* (internal quotation marks omitted).

Taking the issue of ripeness first, this well-settled standard disposes of defendants' contention that plaintiffs' claims are unripe. Defendants argue that this suit is premature because no plaintiff has yet been the subject of civil or criminal enforcement for violating section 518, and plaintiffs supposedly would suffer no hardship from postponing review. But that argument simply ignores the gravamen of this suit, which claims that section 518 presently burdens and chills plaintiffs' fundamental right of free speech. That is an cognizable injury plaintiffs would continue to suffer on an ongoing basis if review were withheld. This suit is clearly ripe.

As to standing, defendants recognize the governing principles and concede that four of the ten plaintiffs in this action legitimately fear enforcement and therefore have standing. *See* Defs.' Reply Mem. of Law in Further Supp. of Mot. To Dismiss at 8–9. While this concession alone is sufficient to allow this suit to continue, the Court must resolve each plaintiff's standing in order to determine the scope of any injunction in this case—i.e., precisely which parties the defendants would be formally prevented from suing or prosecuting under section 518.

In addition, it is useful to discuss defendants' challenge to the remaining six plaintiffs' standing because it casts light on the proper interpretation of section 518.

As an initial matter, plaintiffs argue that they all have standing because, as they read it, section 518 draws the line between permissible discounts and impermissible surcharges based solely on the words and labels a seller uses to describe its prices. Here, each plaintiff avers that but for section 518, they would charge different prices for cash and credit and would frame that price difference as a credit-card surcharge. Plaintiffs therefore claim that they all legitimately fear enforcement and therefore have standing.

Defendants, however, contend that section 518 "is an anti-fraud statute prohibiting sellers from charging credit card users an additional hidden fee not displayed as prominently as the cash price." Mem. of Law in Supp. of Defs.' Mot. To Dismiss and in Opp'n to Pls.' Mot. for Prelim. Inj. ("Defs.' Mem.") at 21. On defendants' reading, a "surcharge" is any increase over a seller's regular price, and a seller's "regular" price, in turn, is the price, in dollars and cents, that is most prominently displayed or communicated to consumers. Hence, if a seller's credit-card price is displayed, in dollars and cents, at least as conspicuously as the cash price, then the credit-card price is the "regular price," and there can be no impermissible surcharge.

According to defendants, six of the plaintiffs here—The Brooklyn Farmacy & Soda Fountain, Inc., its co-owner Peter Freeman, Bunda Starr Corp., its president Donna Pabst, Patio.com LLC, and its founder and president David Ross—do not propose to advertise their credit-card prices any less prominently than their cash prices. *See generally* Freeman Decl.; Pabst Decl.; Ross

Decl.[4] Defendants thus argue that these plaintiffs have not proposed to do anything that would violate section 518, and therefore lack standing. The remaining four plaintiffs, however—Expressions, Fiacco, Five Points Academy, and its vice-president Stephen Milles—assertedly want to advertise and their credit-card surcharges only as a percentage fee added on top of their cash prices. *See* Suppl. Decl. of Linda Fiacco; Suppl. Decl. of Stephen Milles. Because these plaintiffs propose not to disclose their credit-card prices in dollars and cents at all (i.e., not as a "sticker price"), their proposals would violate defendants' reading of the statute. Defendants accordingly concede that these four plaintiffs have standing.

But defendants' rather convoluted interpretation of the statute runs into several difficulties. The most obvious is the plain text of section 518 itself, which, as previously stated, reads: "No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Bus. Law § 518. The statute simply bans "surcharge[s]." This, on its face, chills any retailer from characterizing its prices as including a surcharge; conversely it says nothing, and provides no warning or guidance, about how prominently

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[4] To be precise, defendants contend that it is unclear whether Patio.com intends to display the credit card surcharge prominently or only as a line item on the customer's receipt. *See* Defs.' Mem. at 34–35. Fairly read, however, the Ross Declaration indicates that Patio.com wants to include a line item on its receipt in addition to other means of prominently advertising the surcharge. The Ross Declaration states that Patio.com wants "to charge a different price for credit card usage" and "call that price a 'surcharge'" in order to "provide a meaningful incentive to many customers to switch to paying with a debit card, cash or check." Ross Decl. ¶ 8.

prices must be displayed or whether swipe fees must be disclosed in dollars and cents or as a percentage.

Defendants' interpretation also produces absurd results. Consider, for example, a seller who advertises two prices with equal prominence: "$100 per widget" and "$103 per widget with 3% credit-card surcharge." It strains credulity to suggest that a seller using the latter language could not legitimately fear prosecution under section 518.

The actual history of prosecution under section 518 also belies defendants' interpretation. In 1987, just a few years after section 518 was enacted, the District Attorney for Bronx County prosecuted and convicted a gas-station owner, Eugene Fulvio, for imposing an unlawful credit-card fee of five cents per gallon, which was advertised as such. After trial, the Bronx County Criminal Court granted Fulvio's motion to dismiss the charge under section 518 on the ground that, as applied, section 518 was impermissibly vague. *See People v. Fulvio* ("*Fulvio II* ") 517 N.Y.S.2d 1008, 1009–10 (N.Y. Crim. Ct. 1987).[5] In the course of its ruling, the court concluded that, based on "the facts developed in this case," "the pertinent legislative history," and "the position of the People," "precisely the same conduct by an individual may be treated either as a criminal offense or as lawfully permissible behavior depending only upon the *label* the individual affixes to his economic behavior, without substantive difference." *Id.* at 1011 (emphasis original). Although Fulvio had testified that "the signs in his station clearly stated the 'cash price' and the 'credit price' for his gasoline," *id.* at 1010, the court found it

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[5] In an earlier decision in the same case, the court rejected Fulvio's argument that section 518 was impermissibly vague on its face. *See People v. Fulvio* ("*Fulvio I* ") 514 N.Y.S.2d 594, 596–97 (N.Y. Crim. Ct. 1987).

"clear that conviction may be had under the literal terms of GBL § 518 regardless of sign displays," *id.* at 1011. In the court's view, "§ 518 creates a distinction without a difference; it is not the act which is outlawed, but the *word* given that act." *Id.* at 1015 (emphasis original).

Although *Fulvio* is one of the few reported cases involving prosecution under section 518, defendants attempt to dismiss it as a kind of aberration and to find support for their interpretation of section 518 in the definitions of the terms "surcharge," "discount," and "regular price" that existed under the now-lapsed federal statute. But in enacting section 518 the New York legislature chose not to enact those definitional provisions. And even if it had, the federal definitions, like section 518 itself, make no mention of how prominently a seller's credit-card price must be disclosed or whether it may be expressed in dollars and cents or a percentage.

Nor can defendants point to any case law or official pronouncement that would limit section 518's scope to match the lapsed federal definitions. To the contrary, the Attorney General's most recent enforcement actions under section 518 are inconsistent with the federal definitions. As the federal legislative history shows, the federal definitions were designed to "permit[] merchants to have two-tier pricing systems," provided that "*when prices are tagged or posted*, the consumers will be exposed to the highest price *when they see a tagged or posted price.*" S. Rep. No. 97–23, at 4 (emphasis added).[6] In a series of sweeps in 2008 and 2009, however, then-Attorney General Andrew Cuomo enforced section 518

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[6] *See also* Cash Discount Act § 102 (defining "regular price" as (1) the "tag or posted price" for an item if a single price is tagged or posted, or (2) the credit-card price if (a) no price is tagged or posted, or (b) two different prices are tagged or posted, one for cash and one for credit).

against sellers that had no tagged or posted prices, but had only announced their prices orally.[7] These recent enforcement actions are fatal to defendants' reliance on the federal definitions. Contrary to defendants' contention, sellers have every reason to fear, based on recent history, that section 518 will be enforced beyond the bounds of its federal precursor.

For all of these reasons, the Court rejects defendants' reading of the statute, and concludes that all of the plaintiffs here legitimately fear that section 518 may be enforced against them. All of the plaintiffs accordingly have standing.

The Court therefore turns to the merits of plaintiffs' First Amendment claim. It is axiomatic that "[t]he First Amendment protects against government regulation and suppression of speech on account of its content." *United States v. Caronia*, 703 F.3d 149, 162–63 (2d Cir. 2012). Content-based restrictions on speech "require[] heightened scrutiny" and are "presumptively invalid." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664, 2667 (2011). These general principles apply "whenever" the government restricts speech based on the message it

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[7] In a representative case, an investigator called a small home heating oil company "pretending to be a customer ordering oil," and an employee "quoted the price of oil and said that [the company] charge[s] a fee on top of that price for using a credit card." Decl. of Michael Parisi ¶ 6. The Attorney General took the position that that constituted the imposition of an unlawful surcharge under section 518. The company ultimately entered into an Assurance of Discontinuance, which included an agreement to refund "all previously imposed surcharges" over a specified period. *Id.*, ex. A, ¶ 9. The Attorney General took the same position in numerous other cases around the same time. *See* Decl. of John Conover ¶¶ 3–5; Decl. of Donna Zasowski ¶¶3–6; Second Decl. of Deepak Gupta ("Second Gupta Decl."), exs. F, H (press releases announcing settlements with numerous other heating-oil companies).

conveys, and "[c]ommercial speech is no exception," *id.* at 2664. "Criminal regulatory schemes, moreover, warrant even more careful scrutiny." *Caronia*, 703 F.3d at 163.

Plaintiffs claim that section 518 is unconstitutional under these principles because it is an unsupportable content-based restriction on disfavored speech—specifically, speech that describes an extra charge for credit-card usage as a credit-card "surcharge." Defendants, however, contend that section 518 on its face regulates non-expressive conduct—"impos[ing] a surcharge"—not speech. In the alternative, to the extent the statute can be read to regulate speech, defendants contend that it merely imposes a disclosure requirement, a type of regulation subject only to rational basis review. *See Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 95 (2d Cir. 2010).

Defendants' arguments are unpersuasive. For all the reasons already stated, section 518 draws the line between prohibited "surcharges" and permissible "discounts" based on words and labels, rather than economic realities. So read, the statute clearly regulates speech, not conduct, and does so by banning disfavored expression.

It bears noting, however, that even if section 518 somehow could be construed as defendants propose, it would still violate the First Amendment. To begin with, even as defendants read it, section 518 plainly regulates speech. Indeed, defendants' suggestion to the contrary turns the speech-conduct distinction on its head. Defendants argue that while "[i]t is true that if sellers want to use dual pricing, § 518 affects *how* they may communicate it," the statute "does not dictate the *content* of that communication at all," because "sellers are free to set the credit card price at whatever level

they wish." Defs.' Mem. at 37. Thus, in defendants' view, setting prices (which section 518 does not regulate) is speech, but communicating those prices to customers (which the statute, on defendants' own analysis, does regulate) is conduct. That is precisely backwards. Pricing is a routine subject of economic regulation, but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment.

Defendants' argument that their reading of section 518 does nothing more than impose a disclosure requirement fares no better. To be sure, the Supreme Court has held that the government may constitutionally require commercial speakers to disclose truthful factual information as long as it is "reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985). But section 518 on defendants' reading does not merely impose a disclosure requirement, because disclosure alone is not sufficient for compliance. Rather, on defendants' reading, the statute also prohibits sellers from advertising their cash price in a way that causes consumers to perceive it as the regular, baseline price against which all other prices are measured.

It is instructive in this regard to compare defendants' interpretation of section 518 with Minnesota's surcharge law. Minnesota's law provides:

> A seller of goods or services may impose a surcharge on a purchaser who elects to use a credit card in lieu of payment by cash, check, or similar means, *provided (1) the seller informs the purchaser of the surcharge both orally at the time of sale and by a sign conspicuously posted on the seller's premises....*

Minn. Stat. § 325G.051(1)(a) (emphasis added). A seller who fully complied with Minnesota's disclosure requirement would still violate defendants' reading of section 518 if it displayed its cash price one iota more prominently than the credit card price. In this sense, defendants interpret section 518 as an *anti*-disclosure statute, as they read the statute to bar a seller from disclosing its cash price even marginally more conspicuously than its credit-card price.

Because even on defendants' interpretation, section 518 contains not just a disclosure requirement but also an "outright prohibition[] on speech," *id.* at 650, *Zauderer's* lenient standard of review is inapplicable, and the statute must be subjected to "heightened judicial scrutiny." *Sorrell*, 131 S. Ct. at 2664. In particular, commercial speech has traditionally been subject to intermediate scrutiny, which directs courts to consider (1) whether the regulated speech "concern[s] lawful activity and [is] not ... misleading," (2) "whether the asserted governmental interest" justifying the regulation "is substantial," (3) "whether the regulation directly advances the governmental interest asserted," and (4) whether the regulation "is not more extensive than is necessary to serve the governmental interest." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). Section 518, however it is interpreted, cannot pass muster under this standard, for three reasons.[8]

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[8] Because the Court easily concludes that section 518 fails intermediate scrutiny, it need not resolve plaintiffs' argument that the statute sweeps up both commercial and noncommercial speech, subjecting the law to strict scrutiny. *See Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988); *Brown v. Entm't Merchants Ass'n*, 131 S.Ct. 2729, 2738 (2011). The Court notes, however, that commercial speech generally includes speech that "does no more than propose a commercial transaction." *United*

First, the speech restricted by section 518 concerns lawful conduct and is non-misleading. The regulated speech pertains solely to dual pricing, which all parties agree is lawful in itself. And while defendants make much of the fact that credit-card surcharges may be misleading if they are hidden or inadequately disclosed, "the States may not place an absolute prohibition on certain types of potentially misleading information ... if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. 191, 203 (1982). The Court finds nothing "inherently misleading" about a seller describing a price difference as a credit-card "surcharge" or displaying its credit-card price with marginally less prominence than the cash price. *Id.* Indeed, by truthfully and effectively conveying the true costs of using credit cards, surcharges can actually make consumers more informed rather than less, thus furthering rather than impeding the purposes of the First Amendment. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

States v. United Foods, Inc., 533 U.S. 405, 409 (2001), or is "related solely to the economic interests of the speaker and its audience." *Cent. Hudson*, 447 U.S. at 561. In this case, while price information no doubt proposes a transaction and relates to economic interests, "what is going on here is more than just a debate about how best to sell toothpaste." *BellSouth Telecomm., Inc. v. Farris*, 542 F.3d 499, 505 (6th Cir. 2008). Plaintiffs want to convey not only the terms of a transaction, but also *why* prices are what they are and *who* is responsible. Given current debates over swipe fees and financial regulation more generally, those questions have a powerful noncommercial valence. *See id.* at 504–05 (discussing a regulation prohibiting a seller from including a line item on an invoice separately detailing the cost of a particular tax); *Bloom v. O'Brien*, 841 F. Supp. 277, 280–81 (D. Minn. 1993) (similar).

Second, section 518 does not "directly advance[]" any interest in protecting consumers from deception. *Cent. Hudson*, 447 U.S. at 566. To the contrary, insofar as it prohibits credit-card surcharges that are not misleadingly presented, the statute actually perpetuates consumer confusion by preventing sellers from using the most effective means at their disposal to educate consumers about the true costs of credit-card usage. It would be perverse to conclude that a statute that keeps consumers in the dark about avoidable additional costs somehow "directly advances" the goal of preventing consumer deception.

Moreover, even to the extent it can be said to prevent misleading speech, section 518 is riddled with numerous "exemptions and inconsistencies [that] bring into question the purpose" of the statute. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995). While defendants express concern for consumers who may be lured into a transaction they cannot complete without incurring additional unannounced charges, section 518 applies to only one particular type of additional charge: credit-card surcharges. The statute thus does not actually ensure that the most prominently displayed price consumers encounter will reflect the highest price they will have to pay, since handling charges, shipping costs, service fees, processing fees, "suggested tips," and any number of other types of additional charges—which consumers may or may not be able to take steps to avoid—may still be added on top.

Furthermore, even with respect to credit-card surcharges, New York has created numerous exceptions to section 518 for the state itself and certain favored utilities.[9] Defendants offer no explanation for why credit-

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[9] *See* N.Y. Crim. Proc. Law § 420.05 (authorizing York courts to impose "a reasonable administrative fee" on individuals who pay

card surcharges are somehow less deceptive when imposed by the Water Board, for example, than when imposed by ordinary commercial retailers like the plaintiffs. *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 191 (1999) ("[T]he Government presents no convincing reason for pegging its speech ban to the identity of the owners or operators of the [speaker].")[10]

Finally, section 518 is far broader than necessary to serve any asserted antifraud purpose. New York easily could have limited its regulation to surcharges that are deceptive or misleading. Alternatively, it could have passed a provision similar to Minnesota's surcharge law, which permits credit-card surcharges so long as the seller "informs the purchaser of the surcharge both orally at the time of sale and by a sign conspicuously posted on the seller's premises." Minn. Stat. § 325G.051(1)(a)(1). And even in the absence of any statute specifically regulating surcharges, New York

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court-imposed fines or fees "by credit card or similar device"); N.Y. Crim. Proc. Law § 520.10(1)(i) ("[A]ny person posting bail by credit card or similar device ... may be required to pay a reasonable administrative fee."); N.Y. Pub. Auth. Law § 1045–j(4–a)(b) (allowing the Water Board to "accept credit cards as a means of payment of fees, rates, rent or other charges," and to impose "a reasonable administrative service fee not to exceed the costs incurred by the water board in connection with such credit card transaction."); N.Y. Pub. Serv. Law § 92–c(9) (allowing telecommunications providers to collect a "premises or location surcharge" for calls originating in the state that are charged to a credit card).

[10] As one commentator has observed, these kinds of exceptions make little sense "unless one sees them as an implicit acknowledgement that when the government plays the role of a merchant, it too does not want to be stuck with any of the transaction costs of credit." Levitan, The Antitrust Super Bowl, *supra*, at 285 n. 92.

already has laws on the books prohibiting false advertising and deceptive acts and practices. *See* N.Y. Gen. Bus. Law §§ 349–350–a. For all these reasons, section 518 is plainly overbroad.

The Court accordingly concludes that section 518, however interpreted, violates the First Amendment.

The Court now moves on to plaintiffs' claim that section 518 is impermissibly vague. "As one of the most fundamental protections of the Due Process Clause, the void-for-vagueness doctrine requires that laws be crafted with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010) (internal quotation marks omitted). "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). "The degree of vagueness tolerated in a statute varies with its type: economic regulations are subject to a relaxed vagueness test, laws with criminal penalties to a stricter one, and laws that might infringe constitutional rights to the strictest of all." *VIP of Berlin*, 593 F.3d at 186 (internal quotation marks omitted). Here, section 518 is subject to the strictest vagueness scrutiny, as it both chills First Amendment rights and imposes criminal penalties. In addition, the statute also contains no "scienter requirement," thus potentially setting "a trap for those who act in good faith." *Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (internal quotation marks omitted).

With these standards in mind, the Court has little difficulty concluding that, to the extent liability under section 518 turns on the labels that sellers use to describe their prices, the statute is impermissibly vague. Indeed, defendants make no attempt to defend the statute so interpreted, conceding that it is "untenable." Defs.' Mem. at 32. That concession is well taken. In the words of the court in *Fulvio II*:

> [it] is intolerable ... that the gasoline station operator careful enough or sophisticated enough to always characterize the lower of [his] prices as a "discount for cash" may enter his automobile at the end of his business day and drive home a free man; however, if the same individual, or his colleague operating the station down the street, *or* his *employee* is careless enough to describe the higher price in terms which amount to the "credit price" having been derived from *adding* a charge to the lower price, he faces the prospect of criminal conviction and possible imprisonment.

517 N.Y.S.2d at 1015 (emphases in original).

Defendants' reading of section 518, whereby the statute simply requires sellers to display their credit-card prices at least as prominently as their cash prices, would present a closer question under the Due Process Clause. But as explained above, defendants' narrowing interpretation strays markedly from the ordinary plain meaning of the statute's text, and therefore cannot save it. *See Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000) (holding that federal courts may narrowly construe a state statute to avoid constitutional problems only if the statute is "readily susceptible to the limitation" (internal quotation marks omitted)).

The Court accordingly concludes that section 518 is also void for vagueness.

The Court now addresses plaintiffs' claim that section 518 is preempted by the federal Sherman Antitrust Act. While plaintiffs have not moved for a preliminary injunction on this claim, defendants have moved to dismiss it. In general, federal law preempts state law if the federal law does so expressly, if the federal law occupies the entire regulatory field, or if the state law conflicts with federal law such that "compliance with both federal and state regulations is a physical impossibility" or the state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012) (internal quotation marks omitted). In the antitrust context, the Supreme Court has held that the Sherman Act preempts state law only if the state law necessarily mandates, authorizes, or causes an antitrust violation. *See Fisher v. City of Berkeley, Cal.*, 475 U.S. 260, 265 (1986). Applying that standard, the Second Circuit has held that a state or local law can be preempted if it has unreasonable "anticompetitive effects." *Hertz Corp. v. City of New York*, 1 F.3d 121, 127 (2d Cir. 1993).

Here, the complaint alleges that by preventing retailers from effectively communicating the costs of credit-card usage to consumers, section 518 "insulates credit card companies from competition, causes the costs of credit to skyrocket, and frustrates the purposes of federal antitrust law—just as Visa and MasterCard's no-surcharge rules did." FAC ¶ 52. According to plaintiffs, because those contractual rules "constituted an antitrust violation, the no-surcharge law that now carries them out does so as well." *Id.* Defendants, however, argue that plaintiffs' preemption claim fails, because, properly interpreted, the statute "is *pro*-competitive: By requiring sellers to prominently disclose the credit card price, § 518 [enables] consumers to make an informed decision

whether the higher credit card price is worth paying at an early moment in the transaction when they can feasibly switch cash." Defs.' Mem. at 42 (emphasis original).

Defendants' argument that section 518 fosters rather than impedes competition presents a factual question that cannot be resolved on a motion to dismiss. Because plaintiffs do not allege or argue that section 518 constitutes a *per se* unlawful restraint of trade, the statute must be subjected to a fact-intensive analysis under "rule of reason." That standard directs "the factfinder [to] weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (internal quotation marks omitted).

Plaintiffs have more than plausibly alleged that section 518 violates the rule of reason. To begin with, the statute imposes a surcharge ban indistinguishable from the bans that Visa and MasterCard recently dropped from their retailer contracts as part of an antitrust settlement. In addition, state and federal no surcharge laws like section 518 were enacted in the name of consumer protection at the behest of the credit-card industry over the objection of consumer advocates. And furthermore, as explained above with respect to plaintiffs' First Amendment claim, the "fit" between the statute's asserted purpose of protecting consumers and its actual scope and effect is dubious at best. Defendants may be able to produce evidence to undercut or rebut these considerations when this claim is fully adjudicated, but the claim cannot be dismissed at this stage of the case.

Having addressed the merits of each of plaintiffs' three claims for relief, the Court turns finally to the remaining factors relevant to the issuance of a preliminary injunction.

First, it is plain that plaintiffs will suffer irreparable harm in the absence of an injunction. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Court has already explained why all plaintiffs reasonably fear that section 518 will be enforced against them, and the plaintiffs' sworn declarations detail how that fear burdens and chills the exercise of their right to free speech.

Defendants assert that plaintiffs' injury is actually monetary in nature, since plaintiffs desire to impose surcharges in order to recoup and reduce the costs of swipe fees. Monetary harms are usually not irreparable. *See, e.g., Dexter 345 Inc. v. Cuomo*, 663 F.3d 59, 63 (2d Cir. 2011). But free expression is no less protected merely because it has an economic impact or motive. *See Sorrell*, 131 S. Ct. at 2665. And section 518 does not merely cause a monetary injury that then incidentally burdens plaintiffs' free speech rights; instead, it directly prohibits and penalizes free expression. *See Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 72 (2d Cir. 1996) (drawing this distinction). That injury is cognizable and irreparable.

Defendants also argue that plaintiffs' delay in bringing this action belies their claim of irreparable harm. To be sure, "[p]reliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights," and delay thus "tends to indicate at least a reduced need for such drastic, speedy action." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985). But

any delay in this case was not unreasonable. As noted, the controversy over section 518 only became "live" after Visa and MasterCard dropped their contractual bans on surcharges in January of this year as part of an antitrust settlement. In May, Visa and MasterCard were still working to give retailers the technical ability to impose surcharges over the relevant networks. *See* Decl. of Gary B. Friedman ¶¶ 1–5. This suit was then filed on June 4, 2013. Furthermore, as of the date of this Opinion, the antitrust settlement still has not been finally approved. *See In re Payment Card Interchange Fee Merchant Discount Antitrust Litig.*, No. 05–MD–01720 (JG)(JO) (E.D.N.Y. fairness hearing held Sept. 12, 2013). Plaintiffs have not sat on their rights, and have more than adequately shown irreparable harm.

As to the public interest, the public has an undeniable interest in having access to full and accurate information.

As the Supreme Court has explained, even in the context of purely commercial information, "[t]he listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). "Advertising," moreover, "though entirely commercial, may often carry information of import to significant issues of the day." *Id.* These values are well exemplified by plaintiffs' desired speech. Consumers make decisions about methods of payment millions of times every day, and credit-card surcharges convey information that is critical to those decisions. The information conveyed by surcharges also is relevant to current debates over swipe fee regulation, as well as financial regulation more broadly. And even beyond the informational content of surcharges, sellers' inability to effectively inform consumers of the true costs of credit has the effect of

artificially subsidizing credit at the expense of cash, increasing overall credit-card usage and consumer debt.

Accordingly, for the foregoing reasons, the Court hereby preliminarily enjoins the defendants from enforcing section 518 of the New York General Business Law during the pendency of this case, and denies defendants' motion to dismiss in full. In addition, the stay of proceedings imposed on August 14, 2013 is hereby lifted. The parties are directed, within one week of the date of this Order, to jointly telephone Chambers to schedule further proceedings in this case. The Clerk of the Court is directed to close documents numbered 26 and 49 on the docket of this case.

SO ORDERED.

APPENDIX E

United States Court of Appeals,
Second Circuit

Nos. 13–4533, 13–4537

EXPRESSIONS HAIR DESIGN, Linda Fiacco, The Brooklyn Farmacy & Soda Fountain, Inc., Peter Freeman, Bunda Starr Corp., Donna Pabst, Five Points Academy, Steve Milles, Patio.com LLC, David Ross,
Plaintiffs–Appellees,

v.

Eric T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, Charles J. Hynes, in his official capacity as District Attorney of Kings County,
Defendants–Appellants.

January 13, 2016

Appeals from the United States District Court for the Southern District of New York

ORDER REGARDING PETTION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of January, two thousand sixteen.

Expressions Hair Design, Linda Fiacco, The Brooklyn Farmacy & Soda Fountain, Inc., Peter Freeman, Bunda Starr Corp., Donna Pabst, Five Points Academy, Steve Milles, Patio.com LLC, David Ross,

Plaintiffs - Appellees,

v.

Eric T. Schneiderman, In his official capacity as Attorney General of the State of New York, Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, District Attorney Charles J. Hynes, in his official capacity as District Attorney of Kings County,

Defendants - Appellants.

ORDER

Docket No. 13-4533(L)
13-4537(con)

Appellees have filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

No. 15-1391

RECORD AND BRIEFS

Supreme Court, U.S.

AUG - 1 2016

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *et al.*,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ERIC T. SCHNEIDERMAN

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QUESTION PRESENTED

Whether a New York law that prohibits sellers from charging consumers additional fees above the regular, posted price when they use a credit card implicates the First Amendment.

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Tex. Bus. & Comm. Code Ann. § 604A.002 3

Tex. Fin. Code Ann. § 339.001 3

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Miscellaneous Authorities

American Lawyers Q., *Usury Rate Summary* (Mar. 2010), *at* www.alqlist.com/InterestRateSummary.html 15

The Fair Credit Billing Act Amendments of 1975, Hearing Before the Subcommittee on Consumer Affairs of the Committee on Banking, Currency & Housing, 94th Cong. 24 (1975) 2

National Conference of State Legislators, *State Minimum Wages: 2016 Minimum Wage by State* (Revised July 19, 2016), *at* www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx 15

STATEMENT

The New York statute at issue in this case, General Business Law § 518, prohibits sellers from levying a surcharge on consumers who purchase goods or services using a credit card instead of cash.[1] Sellers are permitted, however, to provide discounts to cash users. (CA2 J.A. 109.) Petitioners—five New York businesses (and their owners) that want to charge consumers more for using credit cards (CA2 J.A. 56-61, 65)—claim that New York's surcharge prohibition violates the First Amendment and is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment. (CA2 J.A. 74-75.)

1. New York's surcharge prohibition is modeled on a federal statute that was enacted in 1976 but that lapsed in 1984. Like New York's law, the federal statute prohibited credit-card surcharges while permitting cash discounts. Pub. L. No. 94-222, § 3(c), 90 Stat. 197, 197 (1976). The statute thus provided that "[n]o seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash," *id.*, with "surcharge" defined as "any means of increasing the regular price to a cardholder which is not imposed" on a cash user, *id.* § 3(a), 90 Stat. at 197. By contrast, the statute permitted sellers to offer a "discount" for consumers who used cash, with "discount" defined as "a reduction made from the regular price." *Id.* To

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[1] The term "cash" is used herein to refer to payment through means other than a credit card, including cash, debit, or check.

further clarify the difference between surcharges and discounts in relation to a seller's regular price, Congress later enacted an amendment defining the term "regular price" as: (1) the posted price, if a seller posts only one price; or (2) the credit-card price, if a seller either does not post any price or posts prices for both credit and cash purchases. Cash Discount Act, Pub. L. No. 97-25, § 102(a), 95 Stat. 144, 144 (1981).

Congress enacted this federal prohibition because of its view that credit-card surcharges caused consumer and economic harms that mere cash discounts did not. Specifically, the federal prohibition was intended to prevent sellers from using surcharges to extract windfall profits; to avoid consumer confusion and unhappiness caused by the imposition of extra charges above the posted price; and to stop fraudulent and deceptive sales tactics by sellers who could lure consumers with a lower sticker price but then surprise them with a credit-card surcharge at the point of sale. *See The Fair Credit Billing Act Amendments of 1975, Hearing Before the Subcommittee on Consumer Affairs of the Committee on Banking, Currency & Housing*, 94th Cong. 24, at 5-8 (1975) (Kathleen F. O'Reilly, Legislative Director, Consumer Federation of America); *see also id.* at 19-22 (John Sheehan, Legislative Director, United Steelworkers of America).

2. The federal surcharge prohibition expired in 1984. At that time, New York (along with several other States) made the policy choice to prohibit

credit-card surcharges themselves.[2] New York's surcharge prohibition largely mirrors the wording of the federal statute, providing that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash." N.Y. Gen. Bus. Law § 518. Violations of New York's surcharge prohibition are punishable as misdemeanors. *Id.* The New York Attorney General is also authorized to bring civil enforcement actions to prevent or stop violations of the statute. *Id.* § 513; N.Y. Exec. Law § 63(12).

Although New York's statute does not incorporate the federal statute's definitions or expressly permit cash discounts, the Legislature made clear that New York's statute should be construed identically to the prior federal law. (*See* CA2 J.A. 109, 112.) And both legislators and consumer groups made equally clear that New York's law was motivated by the same underlying policy rationales as the lapsed federal surcharge prohibition: preventing unfair profiteering, consumer anger, and deceptive sales tactics. (*See* CA2 J.A. 109, 111-112, 114.)

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[2] In addition to New York, nine other States and Puerto Rico prohibit credit-card surcharges. *See* Cal. Civ. Code § 1748.1(a); Colo. Rev. Stat. § 5-2-212; Conn. Gen. Stat. § 42-133ff; Fla. Stat. § 501.0117; Kan. Stat. Ann. § 16a-2-403; Me. Rev. Stat. tit. 9-A, § 8-509; Mass. Gen. Laws ch. 140D, § 28A; Okla. Stat. tit. 14A, § 2-211; P.R. Laws Ann. tit. 10, § 11; Tex. Fin. Code Ann. § 339.001. Five of these States also prohibit sellers from collecting surcharges from consumers who use debit cards. *See* Conn. Gen. Stat. § 42-133ff; Kan. Stat. Ann. § 16a-2-403; Me. Rev. Stat. tit. 9-A, § 8-509; Okla. Stat. tit. 14A, § 2-211; Tex. Bus. & Comm. Code Ann. § 604A.002.

3. Until recently, the state no-surcharge laws were "effectively redundant" because private contractual agreements between sellers and credit-card companies already prohibited sellers from extracting surcharges for credit-card use. (CA2 J.A. 63 (Complaint).) In 2013, the credit-card companies agreed to temporarily lift these contractual surcharge prohibitions as part of a class-action settlement with sellers to resolve federal antitrust claims. *See In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, – F.3d –, 2016 WL 3563719, at *2-*3 (2d Cir. June 30, 2016). But a little more than a month ago, the Second Circuit reversed the settlement and vacated the class certification. *Id.* at *1, *12. The Second Circuit's decision has left unclear the current effect of the contractual surcharge prohibitions and the lasting practical import of state no-surcharge laws.

4. In 2013, petitioners filed this lawsuit against the New York Attorney General and three district attorneys, challenging the constitutionality of New York's credit-card surcharge law. (CA2 J.A. 6, 74-75.) The U.S. District Court for the Southern District of New York (Rakoff, J.) issued a preliminary injunction prohibiting the defendants from enforcing New York's surcharge law against petitioners (Pet. App. 85a), on the ground that the law violated the First and Fourteenth Amendments (Pet. App. 79a-80a).[3]

The parties stipulated to a court-ordered final judgment, with defendants reserving their right to

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[3] Petitioners also asserted an antitrust claim (CA2 J.A. 75), but that claim is not at issue here.

appeal. (Pet. App. 48a-54a.) In that judgment, the district court declared New York's surcharge law unconstitutional and issued a permanent injunction.[4] (Pet. App. 51a, 54a.)

5. The U.S. Court of Appeals for the Second Circuit vacated the judgment and remanded for dismissal of the complaint. (Pet. App. 3a.) The court construed petitioners' claims as challenging the application of New York's surcharge prohibition to "two distinct kinds of pricing schemes," and separately analyzed the constitutionality of each such prohibition. (*See* Pet. App. 13a-18a, 31a-37a.)

First, the court considered the pricing practice of collecting additional money in excess of a regular, posted "sticker price" when consumers use a credit card. (Pet. App. 14a-16a.) The court found that New York's statute plainly prohibited this pricing practice based on the "ordinary meaning" of the term "surcharge"—*i.e.*, levying an "additional amount above the seller's regular price" (Pet. App. 13a-14a).

The court also held that this prohibition is constitutional. As to petitioners' First Amendment claim, the court determined that the prohibition against adding credit-card fees above a seller's regular price is a direct price-control regulation that does not implicate the First Amendment. (Pet. App.

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[4] The final judgment also dismissed petitioners' antitrust claim without prejudice to petitioners renewing this claim if the final judgment were to be reversed. (Pet. App. 51a.) Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the court determined that there was no just reason to delay entry of final judgment on petitioners' First and Fourteenth Amendment claims. (Pet. App. 54a.)

18a-28a.) In so holding, the court rejected petitioners' theory that the surcharge prohibition restricted only the "words and labels" sellers use to describe equivalent price differentials between the prices they charge to credit users and cash users. (Pet. App. 20a (quoting district court opinion).) Rather, the court explained: "What Section 518 regulates—all that it regulates—is the difference between a seller's sticker price and the ultimate price that it charges to credit-card customers." (Pet. App. 21a-22a.) A seller remains free to characterize its price differentials "as whatever it wants," but such descriptions "would not change the fact" that adding credit-card fees to regular prices is prohibited while deducting amounts from regular prices for cash use is permitted. (Pet. App. 22a.) The court concluded that this regulation of economic conduct comported with the First Amendment. (Pet. App. 18a-19a.)

The court also rejected petitioners' vagueness challenge with respect to the statute's prohibition against run-of-the-mill surcharging schemes. Relying on the ordinary meaning of the term "surcharge," the court concluded that both "sellers 'of ordinary intelligence'" and New York enforcement authorities would "readily understand" that adding amounts above a seller's usual, posted prices for credit-card use violated the statute. (Pet. App. 42a.)

Second, the court considered whether New York's statute would also prohibit different pricing methods that do not involve "readily ascertainable" regular prices—such as "dual-price" schemes in which a seller posts both a credit price and a cash price without designating either as the "regular" price. (Pet. App. 15a.) Noting that the New York appellate courts had never interpreted the scope of New York's

surcharge prohibition (Pet. App. 32a), the court abstained from ruling on the constitutionality of New York's prohibition as applied to such pricing methods pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). (Pet. App. 28a, 45a.) As the court explained, the statute was "readily susceptible to a construction under which" it did not prohibit pricing schemes that lacked regular prices (Pet. App. 18a (quotation marks omitted)) because it was "entirely possible, if not likely, that New York courts would interpret [New York's surcharge prohibition] as being identical to the lapsed federal ban" (Pet. App. 35a), which had expressly permitted such practices (Pet. App. 31a-32a).

REASONS FOR DENYING THE PETITION

The petition should be denied for two reasons. First, contrary to petitioners' claim, there is no direct split among the circuit courts on the question of law presented by this case. The Eleventh Circuit decision relied on by petitioners to assert a split struck down a statute that the court read as having a different meaning and applying to different pricing practices than the New York and Texas statutes that have been upheld by the Second and Fifth Circuits. Second, the decision below correctly held that a direct price regulation such as New York's surcharge prohibition does not implicate the First Amendment at all because it addresses conduct, rather than speech. Certiorari is accordingly not warranted.

A. The Decision Below Does Not Implicate Any Direct Circuit Conflict.

1. Petitioners assert (Pet. 16-18) that this Court should grant review because the Second Circuit's decision—along with a decision by the U.S. Court of Appeals for the Fifth Circuit, *Rowell v. Pettijohn*, 816 F.3d 73 (5th Cir. 2016), *petition for cert. filed*, No. 15-1455 (U.S. June 3, 2016)—conflicts with a decision by the Eleventh Circuit finding a Florida surcharge prohibition unconstitutional, *see Dana's R.R. Supply v. Att'y Gen. of Fla.*, 807 F.3d 1235 (11th Cir. 2015), *petition for cert. filed*, No. 15-1482 (U.S. June 8, 2016). But the different outcomes in these cases stem largely from the courts' different understandings of the scope and operation of the particular state statute at issue in each case. Although the wording of the central surcharge prohibition in each State's statute is similar, the courts' divergent views about the potential applications of the statutes to sellers' pricing practices led the Eleventh Circuit to focus on factual and legal issues that were different from the issues on which the Second and Fifth Circuits focused. As a result, these decisions do not create a direct circuit split.

As the Eleventh Circuit itself recognized, the "relevant statutory text and legislative history" of New York's statute "differ from" Florida's—distinctions that led the Second Circuit to reach a "narrow reading" of the scope of New York's law. *Dana's R.R.*, 807 F.3d at 1247 n.9. The Fifth Circuit's subsequent decision expressly followed the Second Circuit's lead in narrowly construing the scope of Texas's surcharge prohibition. *See Rowell*, 816 F.3d at 81. Specifically, the Second and Fifth Circuits interpreted their respective State's statutes as only

prohibiting sellers from imposing additional fees for credit-card use above a posted "single sticker price," and found that this prohibition did not implicate the First Amendment. (Pet. App. 2a, 13a-15a, 18a.) *Rowell*, 816 F.3d at 81.

Neither court held that these no-surcharge laws more broadly prohibited "dual-pricing"—*i.e.*, setting prices for both credit and cash purchases without designating a single sticker price as the easily ascertainable regular price—and thus neither court had occasion to address the constitutionality of such a prohibition. The Second Circuit held that there was too little state-court authority to reach a definitive conclusion about whether New York's law extended to "dual-pricing" absent single-sticker prices, and accordingly abstained from addressing the constitutional question posed by a prohibition on such pricing. (Pet. App. 28a-37a.) In the Fifth Circuit, the parties had conceded that such "dual pricing is allowed," *Rowell*, 816 F.3d at 83, and so that court likewise had no need to resolve the First Amendment implications of a dual-pricing prohibition.

By contrast, the Eleventh Circuit did not read Florida's statute to prohibit only the imposition of additional fees for credit-card use above a regular, posted price and thus, unlike the Second and Fifth Circuits, never squarely addressed the validity of such a "narrow" prohibition. *Dana's R.R.*, 807 F.3d at 1247 n.9. Instead, the Eleventh Circuit understood Florida's statute as applying broadly to all schemes setting "a lower price for customers paying cash and a higher price for those using credit cards"—regardless of whether the seller had posted a regular price—and on the basis of that more sweeping interpretation held that Florida's regulation of such

"dual-pricing" violated the First Amendment. *Id.* at 1239, 1245. This conclusion does not directly conflict with the Second or Fifth Circuit's rulings, since neither court addressed the constitutionality of a prohibition on "dual-pricing" in the absence of a single sticker price—the Second Circuit because it was uncertain whether New York law contained such a prohibition, and the Fifth Circuit because it held that Texas law did not contain such a prohibition.

Indeed, the Eleventh Circuit might have reached a different result if it had been convinced that the Florida statute applies only to surcharges imposed at the time of sale so as to raise the price above the posted sticker price, and not to an explicit dual-pricing scheme. As the dissenting judge in the Eleventh Circuit explained, the majority declined to give any independent meaning to distinct language in the Florida statute that limited its application to surcharges "imposed at the time of a sale"—language that would make the statute inapplicable to the situation where a merchant posts two different regular prices. The dissenter observed that this language supports a narrowing construction that would have obviated any "constitutional problem." *Id.* at 1251, 1253 (Carnes, J., dissenting); *see also id.* at 1252 (Carnes, J., dissenting) ("It is passing strange for a court to dismiss a legislature's definition of its own words as a strained reading of the legislature's own words."). The differing outcome in the Eleventh Circuit, as compared to the Second and Fifth Circuits, thus could have been avoided if the Eleventh Circuit had construed the language of Florida's statute more narrowly to "avoid or modify the necessity of reaching a federal constitutional question," *Kusper v. Pontikes*, 414 U.S. 51, 54 (1973).

The Eleventh Circuit has disagreed with the Second and Fifth Circuits on the meaning of similar language in the statutes of Florida, New York, and Texas—but that difference in construing the meaning of statutory language does not create a split on a *federal* question warranting this Court's review. In effect, despite similarities in statutory language, the Eleventh Circuit adopted an interpretation of Florida's surcharge prohibition that differed from the Second and Fifth Circuit's interpretations of New York's and Texas's laws, and these threshold interpretive differences resulted in distinct conclusions about the prohibitions' constitutional validity. This disagreement presents no square conflict on the application of the First Amendment.

2. An additional reason to deny certiorari is that further developments may clarify or eliminate any division among the circuits on the validity of state no-surcharge laws.

First, because the circuit courts' decisions here all relied on threshold (and contested) interpretations of state laws, further litigation in the state courts may alter the scope of the surcharge prohibitions at issue here. The "last word" on the meaning and scope of each State's surcharge prohibition belongs to that State's highest court rather than any federal court. *Pullman*, 312 U.S. at 499-500. But no State's highest court has yet interpreted a surcharge prohibition, and only one decision by an intermediate state appellate court has addressed such a law. *See Thrifty Oil Co. v. Superior Court*, 91 Cal. App. 4th 1070 (2001). Indeed, the Second Circuit declined to reach part of petitioners' constitutional claims specifically due to the "dearth of authority" from the New York courts (Pet. App. 32a).

The federal-court interpretations of state law on which each circuit court based its decision are thus necessarily "tentative" and could "be displaced tomorrow" by further state adjudications. *Pullman*, 312 U.S. at 500. If the state courts were to issue definitive interpretations of their State's respective surcharge prohibitions, the current differences among the circuit courts might dissipate entirely or ripen into a concrete split on First Amendment issues alone, without any underlying dispute over the proper reading of state law. This Court should not grant certiorari now to review the validity of state surcharge prohibitions in the absence of any meaningful resolution by the state courts of the interpretive disputes over these laws. *See Dana's R.R.*, 807 F.3d at 1251-53 (Carnes, J., dissenting).

Second, awaiting further adjudications would also provide this Court with concrete facts about sellers' actual pricing schemes and the application of state surcharge prohibitions to those schemes. As the Second Circuit noted, petitioners' constitutional claims here were largely based on hypotheticals, rather than "on the actual conduct in which they are engaged or would like to be engaged." (Pet. App. 18a.) The absence of actual experience with enforcement of state surcharge prohibitions is understandable in light of the fact that, until very recently, private contracts between sellers and credit-card companies independently prohibited such surcharges. (*See* Pet. App. 8a-9a; CA2 J.A. 63.) To the extent that the States now begin to enforce their surcharge prohibitions, litigation arising out of such disputes would provide this Court with a particularized understanding of how sellers set and post their prices and how the States will interpret and enforce their

surcharge prohibitions—factual issues that are critical to deciding petitioners' claims.[5]

Third, uncertainty surrounding the effects of the private antitrust settlement between sellers and credit-card companies counsels against granting review. As petitioners acknowledge, state surcharge prohibitions were "effectively redundant" of contractual surcharge prohibitions for many years. (CA2 J.A. 63.) But the state laws "assumed sudden importance" when a private antitrust settlement appeared to remove the contractual surcharge prohibitions. (Pet. 5.) The Second Circuit's recent decision invalidating that settlement has rendered the current status of the contractual surcharge prohibitions unclear and raised significant questions about the lasting practical import of state surcharge laws. See *supra* at 4. If the contractual no-surcharge rules were to be reinstated, the state surcharge prohibitions would again become largely duplicative—reducing any need for this Court's review. This Court should accordingly deny review until there is resolution of whether and for how long the credit-card companies' private agreements with sellers will include contractual surcharge prohibitions.

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[5] Petitioners claim that no further development is needed because there has been a single post-trial decision applying New York's surcharge prohibition and a handful of settlement agreements between the New York Attorney General and fuel sellers. (*See* Pet. 21.) But "[o]ne reported prosecution and one set of threatened prosecutions by the state's executive branch shed little light, if any, on how the New York Court of Appeals would construe" and apply the surcharge prohibition to particularized facts. (Pet. App. 37a.)

Fourth, because only three circuits have addressed state surcharge prohibitions, any potential conflict among the circuits is not fully developed and could wane without this Court's immediate intervention. The Ninth Circuit is currently considering a challenge to California's surcharge prohibition in a case that raises the same type of First and Fourteenth Amendment claims as petitioners asserted below. *See Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199 (E.D. Cal. 2015), *appeal pending* No. 15-15873 (9th Cir.), docketed Apr. 30, 2015. A decision in that pending appeal will likely provide this Court with further valuable analysis and information.

3. Certiorari should be denied for the additional reason that any division among the circuits on the constitutionality of different state surcharge prohibitions is not sufficiently important to warrant further review. Petitioners and their amici assert that interpretive harmony is needed so that sellers operating in multiple States can implement "uniform pricing schemes." (Pet. 20; *see* Br. for Amici Curiae Albertsons LLC, et al., at 13-14.) But States have long enacted a diverse range of price regulations that require merchants to adapt to the distinct regulatory schemes of every State. To give just a few examples, States have enacted different price floors or price ceilings in particular industries;[6] different minimum-

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[6] *See, e.g., Nebbia v. New York*, 291 U.S. 502, 515-20 (1934) (New York regulation of milk prices); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 609-11 (1937) (Virginia regulation of milk prices).

wage requirements that set distinct prices for labor;[7] different anti-usury laws that affect the price of loans;[8] and different discount policies that, for instance, prohibit sellers from using discounts to sell tobacco in some jurisdictions, while allowing such discounts in others.[9] Sellers that choose to do business in multiple States thus already routinely adjust their pricing to comply with each State's distinct pricing rules. Diverse state policies on credit-card surcharges would impose no greater burden on sellers than these and many other existing price regulations.

Moreover, few if any additional state laws are likely to be affected by any potential conflict among the courts of appeals that have addressed the validity of credit-card surcharge prohibitions. In the three circuits that have considered the validity of credit-card surcharge prohibitions, only one State (Connecticut) has a similar statute that has not yet been the subject of federal adjudication. Nor is any tension among the decisions of these three circuits likely to have much impact outside the context of credit-card surcharges. When the Eleventh Circuit struck down Florida's law, the court emphasized the "modest scope" of its decision and highlighted that its holding should not affect other economic regulations

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[7] *See* Nat'l Conference of State Legislators, *State Minimum Wages: 2016 Minimum Wage by State* (Revised July 19, 2016).

[8] *See* Am. Lawyers Q., *Usury Rate Summary* (Mar. 2010).

[9] *See Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 74-75 (1st Cir. 2013); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of N.Y.*, 27 F. Supp. 3d 415, 418-19 (S.D.N.Y. 2014).

because it applied to a surcharge prohibition that the court viewed as unique. *Dana's R.R.*, 807 F.3d at 1251. Thus, there is no wide-ranging impact of these decisions that might warrant a grant of certiorari at this time.

B. The Decision Below Is Correct.

This Court's review is not warranted for the additional reason that the Second Circuit's decision is correct.

1. The Second Circuit correctly rejected petitioners' challenges to the New York statute's prohibition on levying additional credit-card fees above a seller's regular, posted price. States have exercised their police power to regulate prices "from time immemorial, and in this country from its first colonization." *See Munn v. Illinois*, 94 U.S. 113, 125 (1876). This Court has already held that such price-control laws do not implicate the First Amendment because they directly regulate what sellers may lawfully *do* when they set prices, rather than what they may *say* about otherwise lawful prices. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality op.); *id.* at 530 (O'Connor, J., concurring in the judgment); *id.* at 524 (Thomas, J., concurring in part & concurring in the judgment); *see generally Munn*, 94 U.S. at 125 (grain warehousing prices); *Nebbia*, 291 U.S. at 537 (milk prices); *Yee v. City of Escondido*, 503 U.S. 519, 529-30 (1992) (rent prices). And the Second Circuit correctly recognized that this basic principle—that price-control laws regulate economic conduct rather than speech—applies not only when a State regulates final prices, but also when it regulates the relationships between prices. *See also, e.g., Nat'l Ass'n of Tobacco Outlets,*

731 F.3d at 76-78 (rejecting First Amendment challenge to ordinance prohibiting sellers from using discounts to reduce regular price of tobacco products).

New York's credit-card surcharge prohibition does nothing more than prevent sellers from the conduct of extracting charges above their regular, posted prices. Petitioners are simply wrong in arguing that this limitation on how sellers set and deviate from their regular prices affects protected speech by controlling how a seller "chooses to communicate price information to consumers" (Pet. 23). As petitioners conceded below (*see* Pet. App. 19a), price-control regulations have never been thought to implicate the First Amendment even though all prices are necessarily communicated through words or signs.

The Second Circuit thus correctly held that the "central flaw" in petitioners' argument was their "persistence in equating the actual imposition of a credit-card surcharge" or the provision of a cash discount "with the words that speakers of English" usually employ to describe those two distinct pricing practices—*i.e.*, the terms "surcharge" and "discount." (Pet. App. 21a.) The fact that sellers necessarily use words to convey their prices to customers does not mean that "surcharge" and "discount" are *nothing more* than words that describe otherwise identical price differences. Rather, common sense and everyday commercial practice demonstrate that surcharges and discounts are two distinct pricing practices distinguished by their relationship to a seller's regular price. See *supra* at 5-6. And both Congress and the New York Legislature made the rational policy determination that this well-understood difference between surcharges and

discounts is important because credit-card surcharges cause certain economic and consumer harms that cash discounts do not. See *supra* at 2-3. This policy choice to regulate prices does not implicate the First Amendment at all.

Petitioners are thus mistaken in relying on this Court's commercial speech cases. (*See* Pet. 22, 25.) Although States cannot seek to protect consumers by restricting sellers from conveying truthful information *about* lawful prices, *see, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 766-70 (1976), they are free to regulate prices *directly* to shield or influence consumers and the economy, *see, e.g., 44 Liquormart*, 517 U.S. at 507 (plurality op.); *Nebbia*, 291 U.S. at 516-19, 537-38. Only the former type of regulation implicates speech; the latter affects only sellers' conduct of setting prices.

Finally, New York's surcharge prohibition is not unconstitutionally vague as applied to pricing schemes that collect credit-card fees in excess of a seller's regular, posted prices. All that due process requires is that ordinary people and law-enforcement officials can apply common sense to understand the core conduct that New York's statute prohibits. *See United States v. Williams*, 553 U.S. 285, 304 (2008). As the Second Circuit correctly concluded, this principle disposes of plaintiffs' vagueness claim because both everyday experience and common knowledge allow sellers and government enforcers to understand that adding amounts above a seller's regular, posted price is a prohibited surcharge, while deducting amounts from a seller's regular, posted price is a permissible discount.

2. To the extent that petitioners separately seek review of the Second Circuit's distinct holding to abstain from ruling on the constitutionality of New York's statute as applied to "dual-pricing" schemes, that holding also does not warrant certiorari.[10]

Pullman abstention safeguards against the "serious disruption by federal courts of state government [and] needless friction between state and federal authorities" that results when a federal court issues a premature and unnecessary ruling on a federal constitutional question based on a mistaken understanding of state law. *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959); *see Pullman*, 312 U.S. at 500-01. To avoid those hazards, courts can appropriately abstain when a state statute is readily susceptible to an interpretation that, if adopted by the state courts, would avoid or modify any federal constitutional claims at issue. *See Moore v. Sims*, 442 U.S. 415, 429 (1979).

This case presents the paradigmatic circumstances warranting abstention. Petitioners' constitutional claims are premised on their assumption that New York's surcharge prohibition applies more broadly than the prior federal surcharge ban—specifically, by prohibiting pricing practices (such as "dual-pricing") in which sellers do not have regular, posted prices. (*See* Pet. App. 32a; *see also* Pet. App. 28a-29a.) The Second Circuit correctly recognized that there was a

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[10] Petitioners' "Question Presented" does not separately seek certiorari to review the Second Circuit's abstention holding (*see* Pet. i), although the petition discusses that holding (*see* Pet. 28-30.) *See* Sup. Ct. R. 14 (providing that Court will not consider questions that are not set out as questions presented).

"dearth of authority" to support petitioners' characterization of New York law. (Pet. App. 32a.) Indeed, because New York's statute was modeled on the lapsed federal law, it is far more likely that the state appellate courts would interpret New York's surcharge prohibition as having the same scope as the federal statute, under which "dual-pricing" and similar practices were permissible. *See* Cash Discount Act, § 102(a), 95 Stat. at 144. In light of this readily available limiting construction and the absence of New York case law to the contrary, the Second Circuit appropriately declined to address petitioners' constitutional challenge pending further state-court developments.

Contrary to petitioners' assertions (Pet. 28-29), this Court has never pronounced any categorical rule barring courts from abstaining whenever a plaintiff asserts a First Amendment or vagueness challenge to a state statute. *See, e.g., Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 307-12 (1979) (lower court should have abstained on First Amendment and vagueness claims). The cases on which petitioners rely (Pet. 28-29) simply confirm that abstention is not automatic and instead requires that the state statute at issue be susceptible to a limiting construction.[11] That standard is satisfied here.

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[11] *See, e.g., City of Houston v. Hill*, 482 U.S. 451, 468 (1987) (ordinance "not susceptible" to limiting construction); *Procunier v. Martinez*, 416 U.S. 396, 403 (1974) (state interpretation "would not avoid or substantially modify" constitutional question); *Zwickler v. Koota*, 389 U.S. 241, 249 (1967) ("no question of a [statutory] construction . . . that would avoid or modify the constitutional question" (quotation marks omitted));

(*continues on next page*)

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In addition to the petition for a writ of certiorari filed in this case, petitions have also been filed in *Rowell* and *Dana's Railroad*. See *supra* at 8. These two petitions should be denied for substantially the same reasons as explained above. However, if the Court disagrees and is inclined to grant certiorari in one or more of these cases, we respectfully request that the Court grant the petition in this case to provide the New York Attorney General with the opportunity to defend New York's law.

Dombrowski v. Pfister, 380 U.S. 479, 491 (1965) ("no readily apparent" narrowing construction existed); *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964) ("it is difficult to see how an abstract construction" of challenged statutory terms "could eliminate" vagueness).

CONCLUSION

The petition for a writ of certiorari should be denied.

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RECORD
AND
BRIEF

Supreme Court, U.S.
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No. 15-1391

In the Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM, and DAVID ROSS,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; KENNETH P. THOMPSON, in his official capacity as District Attorney of Kings County,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Since the petition in this case was filed, two other petitions presenting the same question have followed suit. *See Rowell v. Pettijohn*, No. 15-1455 (filed May 31, 2016); *Bondi v. Dana's Railroad Supply*, No. 15-1482 (filed June 6, 2016). These petitions each ask the Court to resolve a direct and acknowledged circuit split over whether state no-surcharge laws violate the First Amendment, and they have been filed from each of the three circuits that have thus far divided on the issue.

1. In denying the existence of this clear split, New York stands alone. Courts, commentators, amici, and two of New York's sister states (Florida and Texas) all agree that there is a split. As Florida put it in its petition in *Dana's Railroad* (citing the petition here): "this split is now squarely before this Court for its consideration and resolution," and it implicates "too important an issue to tolerate the circuit split." Pet. in *Dana's Railroad*, at 10, 14. Indeed, even Texas, in *opposing* certiorari in *Rowell*, conceded "the existing circuit split." BIO in *Rowell*, at 9.

It was right to do so. All the state laws at issue in these cases allow merchants to charge a higher price to customers who pay by credit card than those who pay in cash—but only if the difference is framed as a cash "discount." And the plaintiffs in each case seek the same thing: to truthfully and prominently convey the cost of credit as a "surcharge" or an "additional" fee on top of the "sticker" price (by posting a large sign saying, for example, that they charge "a 3% fee on purchases made by credit card"). In Florida, thanks to the Eleventh Circuit's decision, they have a constitutional right to truthfully communicate their prices in this way. In New York and Texas, they do not. That is a textbook example of a "circuit split," as the Fifth Circuit acknowledged. *Rowell v. Pettijohn*, 816 F.3d 73, 78 (5th Cir. 2016).

So New York is simply wrong when it says (at 8) that "these decisions do not create a direct circuit split." The "differing outcome in the Eleventh Circuit" is not due to "different understandings of the scope and operation of the particular state statute at issue in each case," BIO 8, 10; it's due to a fundamental "disagreement over where to draw the speech–conduct boundary" on a question affecting billions of dollars of transactions annually. Pet. in *Dana's Railroad*, at 16.

The Court should not delay in resolving that profoundly important constitutional disagreement based on New York's speculation that hypothetical future state-court litigation "may alter the scope of the surcharge prohibitions." BIO 11. The petitioners here wish to truthfully convey the cost of credit in a way that the Eleventh Circuit held is protected speech. The only reason they cannot do so is because the Second Circuit held the opposite. No state court can overrule that interpretation of the First Amendment. Perhaps it is possible (at least theoretically) that a state court could somehow find a way to radically narrow the scope of New York's law to allow the speech that the petitioners wish to communicate—despite the Attorney General's long-held enforcement position to the contrary, as catalogued in several uncontested merchant declarations in the record, as well as a state-court criminal prosecution. But that unlikely event would not cure the First Amendment harms (not to mention legal fees) suffered in the meantime. And it would do nothing to resolve the split and clarify the constitutionality of the half-dozen state laws, plus Puerto Rico's, that have not yet been challenged.[1]

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[1] By the same token, the Second Circuit's decision to invoke *Pullman* abstention in declining to rule on a subsidiary aspect of the petitioners' challenge does not affect the split. It does, however,

(continued ...)

Nor is there any reason for this Court to await the Ninth Circuit's eventual decision on the constitutionality of California's no-surcharge law. That decision will only widen the split—not cause it to "wane." BIO 14. And the conflict is "fully developed" enough as it is. *Id.* Seven courts have chimed in, producing nine opinions that thoroughly explore the question. The split is "as square as it will ever get." Br. for Albertsons et al. 14.

2. Aside from denying the existence of the split, New York also makes a half-hearted attempt to diminish its importance. But as the six amicus briefs supporting this petition attest, the proper resolution of the question presented is of enormous practical and doctrinal significance. It implicates "*tens of billions of dollars* every year in 'swipe fees,'" *id.* at 3, and concerns nothing less than "the threshold determination of whether a regulation governs speech or conduct," Note, *Free Speech After* Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981, 1988 (2016).

To the extent that New York is suggesting (at 13) that the facts on the ground have now changed because of the Second Circuit's recent disapproval of the proposed antitrust settlement between merchants and Visa and MasterCard, that is not true. Those companies have not changed their merchant contracts to resurrect their anticompetitive and regressive no-surcharge rules, nor have they given any indication that they plan to do so. And the Second Circuit invalidated the settlement in part because it found that the "value and utility" of the settlement's injunctive relief—"the ability to surcharge Visa- and MasterCard-branded credit cards"—was "lim-

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provide further proof that the Second Circuit failed to properly safeguard the petitioners' First Amendment rights, and this Court can say so along the way to deciding the question presented.

ited" by the existence of no-surcharge laws in major states like "New York, California, and Texas." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, — F.3d —, 2016 WL 3563719, at *2–*3 (2d Cir. June 30, 2016). That fact hardly reduces the "practical import of state surcharge laws." BIO 13. If anything, it does the opposite. It shows that the issue is so important that ongoing uncertainty over the constitutionality of no-surcharge laws affected the fate of the largest antitrust settlement in history.

3. On the merits, New York defends the Second Circuit's decision by invoking (at 16) the tautological proposition that "price-control laws regulate economic conduct rather than speech." We do not disagree. Price-control laws regulate economic conduct by controlling the amount that merchants may charge for goods or services. But New York's law does not regulate that conduct. It does not control *any* amounts charged by merchants. They are free to set the cash and credit-card prices for any item as they wish. The only thing the law regulates is how those prices are *communicated*—that is, which of the two prices the merchant may frame as the "regular" price on the label, and which the merchant may convey through a separate sign. Put another way, the law does not regulate the "setting [of] prices," BIO 18, but kicks in only *after* they have been set, by demanding one way of framing them over another. Thus, as a New York court long ago explained, a merchant who adopts the state's preferred framing goes "home a free man," but if the same merchant instead truthfully frames the credit-card price as "having been derived from adding a charge to the lower price, he faces the prospect of criminal conviction and possible imprisonment." *People v. Fulvio*, 517 N.Y.S.2d 1008, 1015 (Crim. Ct. N.Y. 1987).

This feature makes New York's law fundamentally different from any of the price-control laws previously

upheld by this Court. *See* BIO 16 (citing cases). Indeed, New York seems to recognize as much, claiming (at 15) that "few if any additional state laws are likely to be affected" by the answer to the question presented. That could only be true if New York's law operated differently than the price-control laws that states have long had on the books. And so this petition does *not* ask the Court to address whether price-control laws must satisfy First Amendment scrutiny. It asks the Court to resolve a split on a fundamental issue concerning whether and to what extent the Constitution limits state-imposed restrictions on the manner by which merchants can frame and convey truthful *pricing information.*

Finally, it is worth mentioning what New York does not say. New York does not contend that the law would satisfy any level of heightened scrutiny. As the district court and the Eleventh Circuit "easily conclude[d]," App. 75a, no-surcharge laws "crumble[] under any level of heightened First Amendment scrutiny," *Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1239 (11th Cir. 2015). New York does not attempt to argue otherwise. Nor does it deny that, if the question presented in the three pending petitions is certworthy, this case is the best vehicle for answering it. If the Court agrees that the question presented warrants review, it should therefore grant the petition in this case and hold the other petitions.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICI CURIAE ALBERTSONS LLC, CVS HEALTH CORPORATION, H.E. BUTT GROCERY COMPANY, THE KROGER CO., PUBLIX SUPER MARKETS, INC., RITE AID CORPORATION, SAFEWAY INC., SPIRIT AIRLINES, INC., AND WALGREEN CO. IN SUPPORT OF PETITIONERS

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Cohen v. California,
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Expressions Hair Design v. Schneiderman,
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Forsyth Cty. v. Nationalist Movement,
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G.K. Ltd. Travel v. City of Lake Oswego,
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H.D.V.-Greektown, LLC v. City of Detroit,
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Italian Colors Rest. v. Harris, 99 F. Supp. 3d 1199 (E.D. Cal. 2015) 14, 18

Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380 (3d Cir. 2010) 21

Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011) 20

Norton v. City of Springfield, 806 F.3d 411 (7th Cir. 2015) 22

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) ..... *passim*

Rowell v. Pettijohn, 816 F.3d 73 (5th Cir. 2016) ..... *passim*

Serv. Emps. Int'l Union, Local 5 v. City of Houston, 595 F.3d 588 (5th Cir. 2010) 21

Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005) 21

Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) 22, 23

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) 20

United States v. Swisher, 811 F.3d 299 (9th Cir. 2016) 22

Other Authorities

Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265 (2005) 11

Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321 (2008) 6, 7, 8, 12

Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv. J. Legis. 1 (2008) 11, 13, 17, 18

Alan E. Garfield, *To Swear or Not to Swear: Using Foul Language During a Supreme Court Oral Argument*, 90 Wash. U. L. Rev. 279 (2012) 18

Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, Vo.5, No.1 J. Econ. Perspectives 193 (1991) 16, 17

Daniel Kahneman, *Thinking, Fast and Slow* (2011) 16, 17, 18

Reserve Bank of Australia, *Payments Data*, File C3, http://bit.ly/1ZPvOVv 8

Samuel J. Merchant, *Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee Regulation in the Wake of Landmark Industry Changes*, 68 Okla. L. Rev. 327 (2016) 6, 8, 10, 14

Scott Schuh, Oz Shy, & Joanna Stavins, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, Fed. Reserve Bank of Boston, No. 10-03 (2010) 10, 11, 12

Spirit Airlines, *This is Spirit 101*, http://bit.ly/1XKIYV2 9

U.S. Gov't Accountability Off., GAO-10-45, Rising Interchange Fees Have Increased Costs for Merchants, but Options for Reducing Fees Pose Challenges (2009) 7, 8, 9, 11

STATEMENT OF INTEREST[1]

Amici are some of the largest merchants in the United States, and they process millions of credit card transactions every day. They wish to provide truthful information to their customers at the point of sale about the real cost of paying by credit card. No-surcharge laws, like the one challenged in this case, prohibit them from doing so. Even though amici incur a concrete, out-of-pocket cost each time a customer pays with a credit card, state laws such as the one challenged here make it unlawful to tell customers using credit cards that they are being "surcharged" for this expense. Instead, amici and other merchants have little choice but to raise prices to all consumers in order to recover fees charged by the credit card networks. Amici believe that New York's no-surcharge law not only offends the First Amendment, but also suppresses business, harms the economy, and disproportionately burdens low-income consumers. Amici thus have a direct and significant interest in the outcome of this case.

Albertsons LLC and Safeway Inc. comprise the second-largest traditional food and drug retailer in the United States, operating more than 2,220 stores nationwide under 18 well-known banners, including Albertsons, Carrs, Pavilions, Randalls, Safeway,

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties have consented to this filing.

Shaw's, Star Market, Tom Thumb, and United Supermarkets.

CVS Health Corporation and its subsidiaries provide integrated pharmacy health care services. Its retail business sells prescription and over-the-counter drugs, as well as a variety of health and beauty products and other merchandise. CVS Health operates over 9,000 retail stores in 49 states, the District of Columbia, and Puerto Rico. In 2016, the company was ranked seventh on the Fortune 500 list of the largest public companies in the U.S.

H.E. Butt Grocery Company is one of the largest independent food retailers in the nation and the largest private company in Texas. Founded in 1905, H.E. Butt is the primary food retailer in south and central Texas, operating in more than 150 communities across the Lone Star State.

The Kroger Co. is the largest traditional grocer in the United States, operating in 34 states and the District of Columbia. The Kroger Co., its franchisees, and its subsidiaries operate some 3,800 stores nationwide, including more than 2,600 supermarkets and multi-department stores, 780-plus convenience stores, and 330 fine jewelry stores.

Publix Super Markets, Inc. is the largest employee-owned retail grocery chain in the United States. It operates more than 1,100 stores in Alabama, Florida, Georgia, North Carolina, South Carolina, and Tennessee.

Rite Aid Corporation is the largest drugstore chain on the east coast and the third-largest in the

United States. It operates approximately 4,600 stores in 31 states and the District of Columbia.

Spirit Airlines, Inc. is the leading low-cost airline in the United States, the Bahamas, the Caribbean, and Latin America. Spirit operates more than 375 daily flights to more than 50 destinations. One of the youngest-flying fleets in the industry, Spirit is ranked among Fortune's fastest growing companies.

Walgreen Co. is the largest drug retail chain in the United States and ranks thirty-fifth among Fortune 500 companies. Walgreens serves 8 million consumers each day and operates more than 8,300 stores in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. In fiscal year 2015, Walgreens provided its customers with approximately 894 million prescriptions and immunizations.

SUMMARY OF ARGUMENT

American consumers know that there is no such thing as a free lunch. But many do not understand that there is also no such thing as a free credit-card transaction. And the consumers do not understand that basic fact because a number of states actively suppress speech about it at the time and place at which consumers would be most receptive to the message—namely, the point of sale.

In reality, credit card networks charge America's merchants *tens of billions of dollars* every year in "swipe fees" on consumer purchases.[2] Yet ten states,

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[2] Although the mechanics of a credit-card transaction are complicated, we use the term "swipe fee" or "interchange fee" to refer to the full bundle of fees imposed on the merchant and collected by various entities, including merchants' banks, the

including New York, California, Texas, and Florida, have laws that prohibit merchants from passing through these fees by accurately labeling them as "surcharges" on customers who opt to use credit cards. As a result, merchants—many of which operate on razor-thin margins—have little choice but to charge higher prices to *all* consumers in order to recoup the credit networks' hefty fees. Cash-paying customers, who are disproportionately lower-income, wind up subsidizing the credit transactions—rewards programs and all—of credit-paying consumers. Such is the economic system that no-surcharge laws perpetuate.

This Court's review of the constitutionality of these provisions is urgently needed. No-surcharge laws directly impact the movement of huge sums of money in the American economy every day. Those protectionist provisions have created a massive market inefficiency by incentivizing far more credit-card transactions than would occur in a free market with accurate information available to consumers about the true cost of credit. Although not all states have no-surcharge laws, the four largest states do, and those laws unsurprisingly exert outsized influence on the national economy; indeed, the ten states with no-surcharge laws collectively include 40% of the country's population. Given that the lower-court split over the constitutionality of no-surcharge laws already encompasses the four largest states (New York, Florida, Texas, and California), the issue is

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credit-card networks, and the banks issuing credit to consumers. Those fees typically amount to 1.5% to 3% of the purchase price on credit-card transactions.

unquestionably ripe for this Court's immediate review.

New York and other states have tried to downplay the importance of this issue by noting that even though they prohibit "surcharges," they nonetheless allow "discounts" for customers who pay with cash. A cash discount and a credit-card surcharge may be the same as a matter of basic arithmetic, but an extensive body of scientific research has shown that the way in which the price difference is *communicated* has a powerful impact on consumer behavior: Shoppers perceive a $1 surcharge as far more undesirable than they perceive a $1 discount as beneficial. This central principle of human cognition, called "loss aversion" by economists, explains why the credit-card industry has tolerated "discounts" but has fought tooth-and-nail to prevent merchants from imposing "surcharges." Absent this Court's intervention, no-surcharge laws—which prohibit merchants from using particular *words* to convey a particular *message*—will continue to skew consumer behavior in irrational ways, to the detriment of merchants and consumers alike.

Certiorari is also warranted because no-surcharge laws fundamentally conflict with this Court's precedents regarding content-based restrictions on speech. The lower courts assumed without deciding that intermediate scrutiny was the appropriate framework in which to analyze no-surcharge laws. But under this Court's decision last Term in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), no-surcharge laws impose content-based restrictions on speech and should accordingly be subject to strict scrutiny—a demanding standard that these laws cannot remotely

satisfy. *Reed* further underscores the profound constitutional infirmities of laws that do nothing but prohibit the truthful dissemination of information to consumers.

ARGUMENT

I. No-Surcharge Laws Have A Massive And Unwarranted Impact On The National Economy.

A. No-Surcharge Laws Harm Merchants by Prohibiting Truthful Communications About the Cost of Credit.

Every sale between a merchant and a consumer carries some cost for the merchant—the quintessential transaction cost. A purchase for which the consumer pays with a credit card costs a merchant approximately six times as much as a cash transaction. *See* Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1321 (2008). America's merchants pay nearly $40 billion in swipe fees each year—more than three times Hollywood's total annual box-office receipts. *See id.* at 1323-24. Those fees are then used in part to fund lavish rewards programs—such as cash-back offers and airline and hotel rewards—that banks and credit-card companies use to promote the use of credit and attract high-income customers. According to one recent study, nearly *half* of credit-card interchange fees are spent on customer rewards programs. *See* Samuel J. Merchant, *Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee Regulation in the Wake of Landmark Industry Changes*, 68 Okla. L. Rev.

327, 336-37 (2016) ("*Merchant Restraints*") (44% of interchange fees used for rewards programs).

None of this would be objectionable if customers who choose to pay with credit cards were required to bear the marginal cost of their expensive payment method. Just as online shoppers pay more for overnight shipping than for 5-day ground shipping, credit card customers would be required to pay an additional fee to offset the high costs of processing their transactions. Yet ten states, including New York, California, Texas, and Florida, prohibit merchants from surcharging credit transactions at the point of sale. In other words, merchants in those states are prohibited from conveying truthful information to consumers about credit-card costs at the precise moment when that speech would be *most likely* to influence the consumer's decision. As a result, "consumers never internalize the costs of their choice of payment system." *Economic Costs*, *supra*, at 1324. This government-compelled asymmetry of information among credit-card companies, merchants, and consumers "results in more credit card transactions at higher prices than would occur in a perfectly efficient market." *Id.*

The Government Accountability Office conducted an extensive study of the impact of swipe fees on economic growth, and determined that—contrary to the claims of the credit industry—swipe fees are *not* offset by any increase in sales from credit-card use. *See* U.S. Gov't Accountability Off., GAO-10-45, Rising Interchange Fees Have Increased Costs for Merchants, but Options for Reducing Fees Pose Challenges (2009). The GAO interviewed leaders from

large merchants, small businesses, and merchant associations, and found that both state laws and contractual restraints imposed by credit card companies "preclude merchants from adding surcharges for credit card payments" and, thus, from offsetting "their increased payment costs" from rising swipe fees. *Id.* at 2, 29. Those merchants were especially frustrated by their inability to impose surcharges on consumers who use rewards-program cards that carry the highest swipe fees (sometimes exceeding 3% of the purchase price). *See id.* at 15-16 (noting that "interchange fee costs for Visa's and MasterCard's premium cards have increased about 24 percent since they were introduced in 2005").[3]

In the wake of a 2013 settlement of antitrust claims, Visa and MasterCard no longer impose *contractual* rules that prohibit surcharging. *See In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013). But ten states continue to ban the imposition of credit-card surcharges, thereby prohibiting the truthful dissemination of cost information and preventing consumers from making fully informed decisions about whether to use credit or another form of payment. *See Merchant Restraints*, *supra*, at 378-80 (collecting state laws). As a result, consumers are

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[3] This increase in swipe fees was by no means inevitable. Even as those fees were increasing sharply in the United States, they were declining in other countries that allowed surcharging. For example, the average swipe fee in Australia on American Express transactions fell from 2.48% to 1.67% after the Reserve Bank of Australia removed a ban on surcharging. *See* Reserve Bank of Australia, *Payments Data*, File C3, http://bit.ly/1ZPvOVv.

forced to "choose among payment systems without factoring in point-of-sale costs." *Economic Costs*, *supra*, at 1336.

Absent this Court's intervention, no-surcharge laws will continue to artificially (and unconstitutionally) skew the relationship between merchants and consumers. If no-surcharge laws are found unconstitutional, however, merchants would finally be given "the ability to send signals to cardholders" about which types of credit cards impose high swipe fees that drive up retail prices. *See Rising Interchange Fees*, *supra*, at 47. Protecting merchants' First Amendment right to communicate truthful information about credit-card fees would also "cause cardholders using rewards cards to be more aware of and to bear more of the cost of the rewards from which they currently benefit." *Id.* at 47-48.

Moreover, no-surcharge laws impose an especially severe burden on merchants that are committed to providing consumers with "unbundled" prices. Amicus Spirit Airlines, for instance, proudly touts on its website that its "secret" is "unbundled awesomeness"—a payment system where consumers pay for *only the specific services that they actually use*. Unlike full-service legacy air carriers, a ticket for air travel on Spirit does not include the cost of "drinks, bags, outdated magazines, and even that tiny bag of peanuts." Spirit Airlines, *This is Spirit 101*, http://bit.ly/1XKIYV2 (last visited June 13, 2016). Spirit's business model is simple: "You only pay for what you want." *Id.*

But the one thing that Spirit and other amici cannot do in states with no-surcharge laws is to

unbundle prices such that only card-paying customers pay for the expenses associated with credit payments. The end result is that *all* customers are compelled to subsidize the subset of customers who opt for the convenience of using a credit card rather than a less-expensive method of payment. In addition to violating the First Amendment, *see infra*, these laws are inefficient as a matter of basic economics and impose significant and unwarranted costs on the national economy.

In short, no-surcharge laws artificially skew purchasing decisions and perpetuate a massive market inefficiency. They are bad for merchants, bad for business, and bad for the economy as a whole.

B. No-Surcharge Laws Harm Consumers by Forcing Merchants To Raise Prices Across-the-Board.

No-surcharge laws also harm consumers. They "force[] the merchant into a troubling dichotomy: either accept less profit on a sale or increase prices on all products to account for the interchange fees incurred from credit-card users." *Merchant Restraints*, *supra*, at 328. "The former option harms the merchant, while the latter harms non-credit-card users like customers paying with cash, check, or debit card[s]." *Id.* Many retailers and other merchants operate on razor-thin margins, and their only realistic option when faced with hefty swipe fees is to raise prices across-the-board for all customers, regardless of their method of payment. *See* Scott Schuh, Oz Shy, & Joanna Stavins, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, Fed. Reserve Bank of Boston, No. 10-03, at 1 (2010) (no-

surcharge laws force merchants to "mark up their retail prices for all consumers by enough to recoup the merchant fees from credit card sales").

As a result, a low-income customer who buys groceries using cash or food stamps is forced to subsidize the transactions of a wealthy customer who pays with a 2%-cash-back rewards card. *See Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 450 (S.D.N.Y. 2013) (Rakoff, J.) ("sellers' inability to effectively inform consumers of the true costs of credit has the effect of artificially subsidizing credit at the expense of cash"); Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv. J. Legis. 1, 1 (2008). The social costs of this system of cross-subsidization are enormous. The negative welfare effects precipitated by no-surcharge laws include "inflation, decreased consumer purchasing power because of greater debt service, lower savings rates, more consumer bankruptcies, inequitable subsidization of credit consumers by non-credit consumers, and unnecessary subsidization of the entire credit card industry." Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 265 (2005).

Worse still, this system is deeply regressive and disproportionately harms poor and minority consumers. According to the Government Accountability Office, consumers who do not use credit cards are "made worse off" by the bundling of the cost of payment with the cost of goods. *See Rising Interchange Fees*, *supra*, at 25. Because credit-card

use correlates strongly with income, the subsidization of credit cards by cash payers entails a significant "regressive transfer of income from low-income to high-income consumers." *Who Gains and Who Loses*, *supra*, at 2. In fact, in a given year, the average cash payer transfers *over $1,200* in wealth to the average credit card payer. *Id.* at 3.

Unsurprisingly, the consumers who benefit the most from no-surcharge laws are affluent shoppers who use premium rewards cards that carry the highest swipe fees. Although merchants must accept all credit cards within a particular brand network, the swipe fees on rewards cards are significantly higher than on non-rewards cards. But rewards cards do not incentivize customers to spend more money with merchants. Rather, "rewards cards are simply shifting transactions to more expensive payment systems for merchants." *Economic Costs*, *supra*, at 1347. Because of no-surcharge laws, "[m]erchants pay the price of accepting rewards credit cards *but see no benefit from doing so.*" *Id.* at 1348 (emphasis added). And "since cash users do not receive rewards" at all, the system perpetuated by no-surcharge laws is doubly regressive. *Who Gains and Who Loses*, *supra*, at 2. Merchants, as well as consumers, would benefit greatly if merchants could truthfully communicate the costs associated with various payment systems and thereby cause consumers to internalize the true cost of their chosen payment method.

Moreover, merchants' inability to communicate truthfully about the cost of credit transactions leads consumers to use credit cards much more frequently than would occur in an efficient market with full

information about the cost of credit. Because credit cards are both transacting instruments and *borrowing* instruments, the overuse of credit cards as a transacting instrument also leads to their overuse as a borrowing instrument. *Social Costs*, *supra*, at 37. Empirical research has linked no-surcharge laws to increased "credit defaults, reduced consumer savings and purchasing power, inflation, and consumer bankruptcy filings." *Id.* at 1-4.

In short, no-surcharge laws not only restrict the words merchants may use to communicate a particular message but also generate "significant effects on consumer behavior and exacerbat[e] a variety of social problems." *Id.* at 43. A prohibition on truthful speech that ultimately suppresses the purchasing power of America's poorest consumers is an issue of paramount importance that unquestionably warrants this Court's review.

C. No-Surcharge Laws Allow a Minority of States To Disproportionately Affect Merchants' Communications About Pricing.

Although only ten states currently have no-surcharge laws, those laws have an outsized impact on pricing in the remaining forty states. Many merchants operate nationwide and pursue nationwide pricing strategies, making it impractical or infeasible for them to charge different prices in different jurisdictions. Although amici are able to shoulder the cost and inefficiency of employing different pricing strategies in different states, many other merchants are not. And, even for amici, the ten states that prohibit surcharging contain 40% of the country's

population. Indeed, the four largest states in terms of population (California, Texas, Florida, and New York), all have no-surcharge laws. "Since most national merchants are generally located in the most populous cities in these states, these national merchants see a significant number of transactions subject to state no-surcharge prohibitions." *Merchant Restraints*, *supra*, at 354.

Given the disproportionate influence on the national marketplace of the small minority of states that have adopted no-surcharge laws, this Court's immediate intervention is needed. The circuit split is as square as it will ever get. All ten of the no-surcharge laws have the same basic contours and impose the same basic prohibitions. *See id.* at 378-79 (listing text of each state statute). Yet the statutes in Florida and California have been found unconstitutional, while the statutes in New York and Texas have been upheld. *Compare Dana's R.R. Supply v. Attorney Gen.*, 807 F.3d 1235, 1251 (11th Cir. 2015) (Florida statute unconstitutionally "criminaliz[es] speech that is neither false nor misleading"), *and Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1209 (E.D. Cal. 2015) (California law "has the effect of preventing one class (retailers) from speaking 'in an effective and informative manner' to their customers"), *with Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 135 (2d Cir. 2015) (New York law "regulate[s] prices" and therefore "do[es] not implicate the First Amendment"), *and Rowell v. Pettijohn*, 816 F.3d 73, 82 (5th Cir. 2016) (upholding Texas statute because "the speech is merely incidental to the regulated economic conduct").

Given that courts have now addressed the constitutionality of no-surcharge laws in *all four* of the largest states in the country—and have reached diametrically opposed results about whether those laws are consistent with the First Amendment—further delay would do nothing to assist this Court's review. The constitutionality of these anticompetitive laws is squarely presented and warrants immediate review.

II. The Specific Words Used To Communicate Prices Have A Powerful Effect On Consumer Behavior.

It is undisputed that New York and the other states that prohibit "surcharging" credit-card transactions nonetheless allow merchants to offer "discounts" to customers who pay with cash. As the Second Circuit noted in the decision below, New York's no-surcharge law "does not prohibit all differentials between the price ultimately charged to cash customers and the price ultimately charged to credit-card customers" because "it permits offering cash customers a discount *below* the regular price that is not also offered to credit-card customers." *Expressions Hair Design*, 808 F.3d at 128; *accord Rowell*, 816 F.3d at 81 ("Texas' law allows a merchant to discount and dual-price as it wishes").

One may then wonder why it makes a dime's worth of difference whether a merchant "surcharges" credit transactions or "discounts" cash transactions; either way, the merchant can charge different prices based on the method of payment in a manner that results in credit-card customers paying more than cash customers. But, although a credit-card

"surcharge" and a cash "discount" may be the same as a matter of basic arithmetic, they are quite different in terms of their *effect* on consumer behavior. A robust body of scientific research on the phenomenon of "loss aversion" shows the importance of the way in which price differences are *communicated*, and further underscores that no-surcharge laws are impermissible content-based restrictions on the *message* that merchants are allowed to convey to their customers. *See Rowell*, 816 F.3d at 85 (Dennis, J., dissenting) (no-surcharge laws "prohibit[] the use of words to convey a particular message").

Suppose someone offers you a gamble on a coin toss: if tails, you lose $100; if heads, you win $150. Any statistician would tell individuals to take this highly favorable bet. Yet many people irrationally reject this bet because "the fear of losing $100 is more intense than the hope of gaining $150." Daniel Kahneman, *Thinking, Fast and Slow* 283-84 (2011). This hard-wired instinct of human cognition—known as "loss aversion"—explains why the credit industry (assisted by friendly state legislatures) has fought to prevent merchants from communicating that they are imposing a "surcharge," while maintaining indifference as to whether merchants provide equivalent "discounts" for cash or other non-credit transactions.

The basic premise of loss aversion is that "the disutility of giving up an object is greater tha[n] the utility associated with acquiring it." Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, Vo.5, No.1 J. Econ. Perspectives 193,

194 (1991). In other words, "changes that make things worse (losses) loom larger than improvements or gains." *Id.* at 199; *see also Thinking, Fast and Slow*, *supra*, at 282-83 (for consumers, "the response to losses is stronger than the response to corresponding gains"). For wine lovers, research has shown that "giving up a bottle of nice wine is more painful than getting an equally good bottle is pleasurable." *Id.* at 293. And loss aversion explains why professional golfers consistently putt better when trying to avoid a bogey than when trying to make a birdie putt of equal difficulty. *Id.* at 303.

This fundamental principle of human cognition also explains why the credit industry prefers to "refer to the cash price as a discount rather than to the credit card price as a surcharge." *Anomalies*, *supra*, at 204. In the context of merchants and consumers, "[i]mposing a surcharge (which is likely to be judged a loss) is considered more unfair than eliminating a discount (a reduction of a gain)." *Id.* Because consumers are inherently loss averse, a 3% "surcharge" for a credit transaction will have a much more powerful impact on consumer behavior than an identical 3% "discount" for cash transactions. One study showed that 74% of consumers had a negative reaction to surcharges, whereas only 22% had a positive reaction to cash discounts. *Social Costs*, *supra*, at 19-20.

This Court's First Amendment jurisprudence has long recognized the importance of the *specific words* used to convey a particular message and the fact that audiences may react very differently depending on the way in which the message is conveyed. Paul Cohen's

jacket would have conveyed a significantly different message if it had said "Please Oppose Military Conscription" rather than the profane anti-draft message he actually chose. Even though both phrases convey the same substantive point, the specific words on the jacket were essential to inducing the intended effect on the audience. *See also* Alan E. Garfield, *To Swear or Not to Swear: Using Foul Language During a Supreme Court Oral Argument*, 90 Wash. U. L. Rev. 279, 280 (2012) (arguing that Cohen's attorney "won the case the moment he uttered the offending word" at oral argument). The government may not "prescribe the form or content of individual expression," and has no legitimate interest in making speech "grammatically palatable." *Cohen v. California*, 403 U.S. 15, 24-25 (1971).

Just so here. No-surcharge laws "exploit a cognitive bias that causes consumers to react differently to mathematically equivalent surcharges and discounts." *Social Costs*, *supra*, at 2. In this way, a "large chang[e] of preferences" is caused by seemingly "inconsequential variations in the wording of a choice problem." *Thinking, Fast and Slow*, *supra*, at 272.

The phenomenon of loss aversion thus makes crystal clear that state-imposed restrictions on whether merchants can "surcharge" credit transactions or "discount" cash transactions are tantamount to direct regulations on the *message* being conveyed to consumers. *See Italian Colors*, 99 F. Supp. 3d at 1207 (no-surcharge law "regulates speech that conveys price information, which is protected by the First Amendment"); *Rowell*, 816 F.3d at 85

(Dennis, J., dissenting) (no-surcharge laws "prohibit[] the use of words to convey a particular message"). As the Eleventh Circuit concluded (with an apt reference to Orwell): "By effectively purging from merchants' vocabularies the doubleplusungood *surcharge* and replacing it with the State's preferred term, *discount*, the constituency most impacted by the no-surcharge law [merchants] has been deprived of its full rhetorical toolkit." *Dana's R.R. Supply*, 807 F.3d at 1247.

III. No-Surcharge Laws Impose Content-Based Restrictions On Speech That Merit Strict Scrutiny Under This Court's Recent Decision In *Reed v. Town of Gilbert*.

For all the reasons set forth above and in the Petition, no-surcharge laws unquestionably regulate speech—not conduct—and therefore implicate the First Amendment. Pet.22-28. And, as the Eleventh Circuit and Judge Rakoff correctly concluded, those statutes "crumbl[e] under even [the] lower form of heightened scrutiny" set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564-66 (1980). *See Dana's R.R. Supply*, 807 F.3d at 1248-49; *accord Expressions Hair Design*, 975 F. Supp. 2d at 445-46 (New York surcharge ban "cannot pass muster" under *Central Hudson*). As Judge Rakoff explained, New York's no-surcharge law flunks *Central Hudson* review because it is a "plainly overbroad" statute that restricts "lawful" and "non-misleading" speech, and "perpetuates consumer confusion" by "keep[ing] consumers in the dark about avoidable additional costs." *Id.* at 446-47 & n.8. The Eleventh Circuit similarly concluded that Florida's no-surcharge law

"founders at every step" of the *Central Hudson* analysis. *Dana's R.R. Supply*, 807 F.3d at 1249.

But, if anything, the First Amendment defects with no-surcharge laws are even worse than that. A faithful application of this Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), requires the application of strict scrutiny—an exacting standard that no-surcharge statutes do not come close to satisfying. *See Dana's R.R. Supply*, 807 F.3d at 1249 (surcharging bans "likewise fail" when "subject to strict scrutiny").

This Court has long differentiated between content-based and content-neutral restrictions on speech. *See, e.g., Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992). The "normal inquiry" under this Court's precedents is "first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny." *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring). A content-based regulation triggers a strict-scrutiny test, whereas a content-neutral regulation triggers intermediate scrutiny. But for many years, "[d]eciding whether a particular regulation [wa]s content based or content neutral wa[s] not always a simple task." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

A deep circuit split eventually developed about how courts should determine whether a regulation of speech was content-based or content-neutral. Three circuits adopted an "absolutist" test under which a regulation of speech was content-based if it distinguished at all among the content expressed,

regardless of the regulation's motivating purpose. *See Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011); *Serv. Emps. Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263-66 (11th Cir. 2005). In contrast, five other circuits adopted a "practical" test, under which a regulation was content-based only if it distinguished *because of* content, even if it facially differentiated between types of speech. *Brown v. Town of Cary*, 706 F.3d 294, 302-04 (4th Cir. 2013); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012); *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 389 (3d Cir. 2010); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 622 (6th Cir. 2009); *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1079 (9th Cir. 2006).

Last Term, this Court definitively resolved this dispute in favor of the "absolutist" test. *Reed*, 135 S. Ct. at 2227-29, 2232. The Court held that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. In other words, a regulation is content-based if it "draws distinctions" based on the "communicative content" of speech, *regardless* of whether those distinctions "can be justified without reference to the content of the regulated speech." *Id.* at 2228. Thus, under *Reed*, a "law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral

justification, or lack of animus toward the ideas contained in the regulated speech." *Id.*[4]

Applying *Reed* here, no-surcharge laws are unquestionably content-based restrictions on speech. A no-surcharge law "prohibits the use of words to convey a particular message" and "makes the legality of a price differential turn on the language used to describe it." *Rowell*, 816 F.3d at 85-86 (Dennis., J., dissenting). Such content-based restrictions are "presumptively unconstitutional." *Reed*, 135 S. Ct. at 2226.

Analyzing no-surcharge laws through some lesser framework such as intermediate scrutiny or "heightened scrutiny" is inappropriate for several reasons. First, this Court's decision in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), applied what the Court called "heightened judicial scrutiny" to a state law restricting the disclosure of certain pharmacy records. *Id.* at 565. But *Sorrell* never held that content-based restrictions on commercial speech are

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[4] *Reed* has already had a perceptible impact in the lower courts. *See Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 632 (4th Cir. 2016) (the "practical" test "is no longer valid due to the Supreme Court's decision in *Reed*"); *United States v. Swisher*, 811 F.3d 299, 313 (9th Cir. 2016) (en banc) (*Reed* "provided authoritative direction for differentiating between content-neutral and content-based enactments."); *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) ("The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification."); *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (*Reed* "abrogate[s] our previous descriptions of content neutrality.").

less suspect than other types of content-based restrictions. It is thus a mistake to read *Sorrell* as permitting the use of something other than strict scrutiny for certain forms of content-based restrictions on speech. If anything, *Sorrell* suggests that when it comes to First Amendment doctrine, "[c]ommercial speech is no exception." *Id.* at 566.

Moreover, *Reed* itself is inconsistent with the notion that different kinds of content-based restrictions on speech may be subject to different kinds of judicial review or different tiers of scrutiny. *Reed* says nothing about favoring some content-based laws over others. Not only was the Court in *Reed* aware of *Sorrell*, but it expressly relied on that decision. If *Sorrell* meant that content-based restrictions on commercial speech were less deserving of strict scrutiny than other content-based regulations, then the Court surely would have said as much in *Reed*.[5] But the Court instead held, *without qualification*, that "content-based restrictions on speech ... can stand only if they survive strict scrutiny." *Reed* 135 S. Ct. at 2231.

In sum, although Petitioners should easily prevail under any standard of First Amendment scrutiny, *Reed* further underscores that the no-surcharge law challenged here is a content-based restriction of speech that is anathema to the First Amendment.

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[5] *Reed* was not a case about commercial speech, but its willingness to rely heavily on *Sorrell*, a commercial-speech case, further suggests that the commercial/non-commercial distinction is irrelevant when it comes to content-based restrictions.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM, and DAVID ROSS.,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; KENNETH P. THOMPSON, in his official capacity as District Attorney of Kings County.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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June 15, 2016

QUESTION PRESENTED

Ten states have enacted laws that allow merchants to charge higher prices to consumers who pay with a credit card instead of cash, but require the merchant to communicate that price difference as a cash "discount" and not as a credit-card "surcharge."

The question presented is:

Do these state no-surcharge laws unconstitutionally restrict speech conveying price information (as the Eleventh Circuit has held), or do they regulate economic conduct (as the Second and Fifth Circuits have held)?

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15 U.S.C. 1666f(a)(2) (1982) ..... *passim*, 3a
15 U.S.C. 1666f(b) (1982) 29, 3a
15 U.S.C. 1666f(b) 7, 9
15 U.S.C. 1666j(c) 6, 9
38 U.S.C. 3705(a) 20
42 U.S.C. 1981 20
N.Y. Gen. Bus. Law (McKinney 2012):
§ 396-r(3)(b)(ii) 20
§ 518 ..... *passim*, 1a
12 C.F.R.:
Section 226.2(tt) (1981) 7
Section 1026.5(a)(1)(A) 9
Section 1026.9(d)(1) 9

Miscellaneous:

Cash Discount Act: Hearing Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing & Urban Affairs, 97th Cong., 1st Sess. (1981) 6, 7

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FCBA Two-Tier Pricing and Procedures for Federal Reserve Board Regulation Writing: Hearing Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing & Urban Affairs, 94th Cong., 1st Sess. (1975) 4, 5, 28, 29

43 Fed. Reg. 3899 (Jan. 30, 1978) 33

S. Rep. No. 23, 97th Cong, 1st Sess. (1981) ..... *passim*

The Fair Credit Billing Act Amendments of 1975: Hearing Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency & Housing, 94th Cong., 1st Sess. (1975) 5

Fredrick Schauer, *Categories and the First Amendment*, 34 Vand. L. Rev. 265 (1981) 18

U.S. Gov't Accountability Office, GAO-10-45, *Credit Cards* (Nov. 2009) 2

themselves from market-forces at the expense of people's individual rights.

The Framers, however, drafted the Constitution with prevention of special-interest legislation—whether the credit card lobby or any other—in mind. Indeed, the idea of "factions" affecting the public interest was addressed by James Madison in Federalist 10. While Madison conceded that such interests could not be stopped completely, he acknowledged that certain steps could be taken to mitigate the "effects" of these groups, and the damage that they can do.

The First Amendment is one such protection. The right of the people to speak—even as to matters of economic concern—are to be protected by the fullest extent of judicial review. When New York passed a law restricting how merchants were to speak—at the direction of the credit-card lobby—it abridged merchants' right to convey their pricing schemes, as well as the public's right to know about them.

ARGUMENT

I. COLLUSION BETWEEN CREDIT CARD COMPANIES AND STATE LEGISLATURES CANNOT BE USED TO CIRCUMVENT PROTECTED SPEECH

A. The Framers Sought to Protect Speech from the Type of Crony Capitalism the New York Statute Manifests

At the heart of this case is the practice known as "crony capitalism:" a system that has been broadly described as interest groups seeking favors from government. *See* Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagnation, and Social Rigidities* (1985). But in reality, the term as a de-

In the Supreme Court of the United States

No. 15-1391

EXPRESSIONS HAIR DESIGN, ET AL., PETITIONERS

v.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

INTEREST OF THE UNITED STATES

This case concerns the application of the First Amendment to a state statute that regulates merchants who charge higher prices to customers paying by credit card than to customers paying by cash. That state statute was enacted following the expiration of a temporary federal law that addressed the same subject, and it replicates portions of the federal statute's language. See Pet. App. 5a-8a. In addition, the analysis that the Court adopts in this case may have significant ramifications for current federal regulation of pricing and related activities. The United States therefore has a substantial interest in the Court's disposition of this case.

STATEMENT

1. In order for a merchant to accept payment by credit card, it must pay the credit-card issuer (and, potentially, an intermediary bank) a fee on each credit-card transaction. Pet. App. 3a; see U.S. Gov't Accountability Office, GAO-10-45, *Credit Cards* 6-9 (Nov. 2009). The total fee is typically about one to three percent of the purchase price, although the precise amount varies depending upon, *inter alia*, the specific card that a customer uses. *Credit Cards* 9-11, 17.

Some merchants seek to recoup the fee or to discourage the use of credit cards by charging a higher price when a customer pays by credit card than when the customer pays by cash (or by check, debit card, or other equivalent means). Pet. App. 3a. Because merchants may incur different fees when accepting different cards, a fixed additional charge for credit-card customers may, in the context of a particular credit-card transaction, be higher or lower than the fee that the merchant must pay.

2. Since its enactment in 1968, the Truth in Lending Act (TILA), Pub. L. No. 90-321, Tit. I, 82 Stat. 146, has regulated the manner in which merchants are required to inform consumers of additional charges for credit-card purchases.

a. TILA originally defined the "finance charge" for a credit transaction to include "any differential between the price for cash transactions and the price for credit transactions." S. Rep. No. 23, 97th Cong., 1st Sess. 1 (1981) (1981 Senate Report) (quoting TILA § 106(a)(1), 82 Stat. 148). By defining the "finance charge" in that manner, the statute required that those differentials be "disclosed to credit customers." *Ibid.*

In practice, however, including such differentials in the finance charge "effectively precluded" merchants from "operating under two-tier pricing systems" that distinguished between cash and credit-card purchases. 1981 Senate Report 1. Adopting such a differential scheme would have resulted in a finance charge being "imposed by the seller at the point of sale," potentially triggering violations of both TILA (if the finance charge were not disclosed) and state usury laws. *Ibid.*

b. In 1974, Congress amended TILA to exclude from the definition of "finance charge" certain "discount[s]" of up to five percent offered by a merchant to "induc[e] payment by cash, check, or other means not involving the use of a credit card." Fair Credit Billing Act (FCBA), Pub. L. No. 93-495, Tit. III, § 306, 88 Stat. 1515. The exclusion applied only if the discount was "offered to all prospective buyers and its availability [was] disclosed to all prospective buyers clearly and conspicuously" pursuant to implementing regulations promulgated by the Federal Reserve. *Ibid.* The amended version of TILA also foreclosed credit-card issuers from contractually prohibiting merchants from offering discounts for cash purchases. *Ibid.*

The amended law's reference to "discounts," rather than to price differentials more generally, sparked debate about whether to distinguish, for regulatory purposes, among three types of pricing systems: (1) an express "discount" system in which "a percentage of the tagged price is deducted to arrive at the cash price"; (2) a "surcharge system * * * in which the tagged price is the cash price and a premium or surcharge is added to the tagged price if the customer chooses to use a credit card"; and (3) a "two-tag sys-

tem * * * in which all merchandise is tagged with two prices, one for cash and one for credit." *FCBA Two-Tier Pricing and Procedures for Federal Reserve Board Regulation Writing: Hearing Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing & Urban Affairs*, 94th Cong., 1st Sess. 2-3 (1975) (*1975 Senate Hearing*) (statement of Federal Reserve Board member); see 1981 Senate Report 2. The Federal Reserve asked Congress to resolve that debate. See 1981 Senate Report 2.

During congressional hearings, one of several points emphasized by advocates of treating surcharge systems differently from other pricing systems was the importance of preventing consumer confusion or surprise when a decision to pay by credit card results in a higher price. A Federal Reserve Board member, echoed by representatives of both a consumer-advocacy group and a credit-card issuer, expressed concern that "different types of pricing systems from one store to the next may tend to confuse consumers and frustrate comparison shopping." *1975 Senate Hearing* 8; see *id.* at 4 (similar); *id.* at 124 (statement of Consumer Federation of America representative); *id.* at 178-179 (statement of American Express representative). "Since one store might discount while another surcharges," he explained, "a simple comparison of tagged prices would not indicate which price is cheaper. The customer would have to perform a mathematical computation to compare the prices, and consumers could find this burdensome and confusing." *Id.* at 8.

The legislative director for the Consumer Federation of America similarly took the view that "[c]onsumers should not have to endure the confusion which

would result from a wide variety of methods of advertising the price of an item," and that "[m]erchants should not be allowed to benefit from the increased volume generated by the posting of a credit card symbol on the window, only to then discourage use of the credit card by imposition of a surcharge." *1975 Senate Hearing* 123-124; see *The Fair Credit Billing Act Amendments of 1975: Hearing Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency & Housing*, 94th Cong., 1st Sess. 8, 13-14 (1975) (*1975 House Hearing*) (same). Banking organizations informed Congress that, in the case of surcharges, "a posting of a sign at entrances may not be sufficient * * * to prevent something akin to the troublesome 'bait and switch' technique." *1975 Senate Hearing* 85-86; see *id.* at 170 (similar from American Express representative); see also *1975 House Hearing* 90 (same). Those organizations explained that "[a] fundamental difference between a discount policy and a surcharge policy, which aggravates the disclosure problem, is that advertising containing a product price under a discount scheme will at worst" cause a consumer who "arrives at a store" to learn "that the cash price is *lower* than was advertised. The contrary is true if a surcharge is applied." *1975 Senate Hearing* 86.

c. In 1976, Congress amended TILA to distinguish between discounts and surcharges. Act of Feb. 27, 1976 (1976 Act), Pub. L. No. 94-222, § 3, 90 Stat. 197. The amendment defined "discount" as "a reduction made from the regular price" and defined "surcharge" as "any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means." § 3(a), 90 Stat.

197 (15 U.S.C. 1602(p) and (q) (1982)); see 15 U.S.C. 1602(p) (1982) ("The term 'discount' * * * shall not mean a surcharge."). Under the amended TILA, the two types of differential-pricing schemes were subject to different regulatory treatment.

The amendment supplemented the preexisting exclusion of certain clearly-disclosed discounts from the definition of "finance charge" by providing that such discounts would also be exempted from state-specific usury and disclosure laws. 1976 Act § 3(d), 90 Stat 198 (15 U.S.C. 1666j(c)). The amendment also contained a temporary rule, set to expire in three years, that prohibited merchants from "impos[ing] a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means." § 3(c)(1), 90 Stat. 197 (15 U.S.C. 1666f(a)(2) (1982)).

That temporary surcharge rule was later extended for an additional two years. 1981 Senate Report 2. Before that extension expired, Congress held a hearing on a proposal to again extend the rule. See *Cash Discount Act: Hearing Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing & Urban Affairs*, 97th Cong., 1st Sess. (1981). A Federal Reserve Board member testified at the hearing that the "economic distinction" between discounts and surcharges was "at best, uncertain," *id.* at 9, and urged Congress to replace the existing rule with a uniform disclosure requirement applicable to both discounts and surcharges, *id.* at 10. Representatives of consumer groups likewise opposed extending the surcharge rule, although representatives of the credit-card industry favored it. Compare, *e.g.*, *id.* at 92 (statement of Consumer Federation of America representative), with *id.* at 43 (statement of American

Express representative). The sponsor of the extension bill expressed the view that the surcharge rule "ha[d] served consumers well by preventing bait and switch type tactics." *Id.* at 1-2 (statement of Sen. Chafee).

d. In 1981, Congress updated, but did not substantially alter, TILA's preexisting framework for discounts and surcharges. See Cash Discount Act (CDA), Pub. L. No. 97-25, 95 Stat. 144. The 1981 amendment extended the surcharge rule for another three years, § 201, 95 Stat. 144; removed the five-percent ceiling on cash discounts that could be excluded from the finance charge, § 101, 95 Stat. 144 (15 U.S.C. 1666f(b)); and limited the Federal Reserve's role in defining the sorts of "clear[] and conspicuous[]" disclosures required for such discounts, *ibid.*; see § 103, 95 Stat. 144.

The amendment also "further clarified" the distinction between discounts and surcharges by enacting a statutory definition (drawn largely from a preexisting regulatory definition) of the "regular price" that would be used as the baseline for classifying a particular pricing scheme into one category or the other. Pet. App. 6a; see 1981 Senate Report 3-4; see also 12 C.F.R. 226.2(tt) (1981). The new statutory definition specified that, if only "a single price [were] tagged or posted" by a merchant, that single price would be the regular price. CDA § 102(a), 95 Stat. 144 (15 U.S.C. 1602(x) (1982)). If "no price [were] tagged or posted," however, or if "two prices [were] tagged or posted, one of which is charged when payment is made by * * * credit card and the other when payment is made by use of cash, check, or similar means," the

regular price would be "the price charged * * * when payment is made by * * * credit card." *Ibid.*

Because TILA continued to define a "surcharge" as "increasing the regular price" when a customer used a credit card, 15 U.S.C. 1602(q) (1982), the new definition made clear that a scheme in which a merchant charged more to credit-card customers would be considered a surcharge (and thus impermissible) only when the merchant displayed the lower cash price in dollars and cents without doing the same for the higher credit-card price. See Pet. App. 15a ("The federal surcharge ban * * * could never be violated unless the seller 'tagged or posted' a single price."). If the merchant listed both prices in dollars-and-cents form, TILA would define the credit-card price as the "regular price," so no increase above the "regular price" would occur and the pricing differential would be considered a permissible discount. The statute likewise permitted a merchant to list *only* the credit-card price, while charging cash customers a lower amount, without violating the surcharge prohibition. In that circumstance as well, the credit-card price would *be* the "regular price" as that term was defined in the statute, and no increase over the regular price would occur.

The Senate Report accompanying the 1981 legislation explained that the temporary surcharge rule was "intend[ed] to assure that consumers will be seeing at least the highest possible price they will have to pay when they see a tagged or posted price." 1981 Senate Report 4. The statute "permit[ted] merchants to have two-tier pricing systems," "to offer a differential between the credit price and the cash price," and "to choose the manner and method by which they will tag

or post these prices," so long as "when prices are tagged or posted, the consumers will be exposed to the highest price." *Ibid.* The purpose of that approach was to ensure that merchants "cannot implement two-tier pricing systems which deceive or mislead the consumer." *Ibid.* "In other words, consumers cannot be lured into an establishment on the basis of the 'low, rock-bottom price' only to find at the cash register that the price will be higher if a credit card is used." *Ibid.*

e. In 1984, TILA's temporary surcharge rule expired, and Congress has not renewed it. Pet. App. 7a. Other provisions concerning higher prices for credit-card customers—prohibiting credit-card issuers from contractually barring cash discounts, 15 U.S.C. 1666f(a); excepting certain clearly and conspicuously disclosed discounts from the definition of a "finance charge" and from state laws, 15 U.S.C. 1666f(b), 1666j(c); and defining relevant terms, see 15 U.S.C. 1602(q), (r), and (y)—remain in the statute. Under current TILA regulations, however, the disclosure requirements applicable when merchants impose credit-card surcharges at the point of sale are no more exacting than the disclosure requirements that apply when merchants provide cash discounts. See 15 U.S.C. 1666f(b) (requiring "clear[] and conspicuous[]" disclosure of discounts); 12 C.F.R. 1026.5(a)(1)(A), 1026.9(d)(1) (requiring only prior oral disclosure when someone other than card issuer imposes a finance charge, such as a credit-card surcharge, at the point of sale).

3. a. Following the expiration of the federal surcharge rule, various States, including New York, enacted their own surcharge laws. Pet. App. 7a. New

York's law, N.Y. Gen. Bus. Law § 518 (McKinney 2012), makes it a misdemeanor criminal offense for a seller to "impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." Although Section 518's "operative language is essentially identical" to the expired federal surcharge rule, the state law "does not incorporate its federal counterpart's explicit definitions of 'surcharge,' 'discount,' and 'regular price.'" Pet. App. 7a-8a.

b. Petitioners are New York-based businesses, owners, and managers who allege that they "would like to impose a credit-card surcharge, as opposed to offering a cash discount," on prices they charge to their customers. Pet. App. 11a. They claim that they are chilled from doing so by Section 518, and that the state law both violates the First Amendment and is unconstitutionally vague. *Id.* at 10a-11a.

Two petitioners have indicated that they want to display only the price for cash customers, and not the price for credit-card customers, in dollars-and-cents form, accompanied by a proviso stating that a "surcharge" (of, say, three percent) applies to customers who pay by credit card. Pet. App. 11a. One of those petitioners also alleges that, although it currently displays both cash and credit-card prices in dollars-and-cents form, it "fears that it will be prosecuted under Section 518 simply for characterizing that price difference as a 'surcharge' or an 'extra' charge for paying with a credit card." *Id.* at 29a (citation and internal quotation marks omitted).

c. Petitioners brought suit in federal district court against respondent state and local officials. The district court ultimately granted permanent injunctive

relief precluding respondents from enforcing Section 518 against petitioners. Pet. App. 48a-85a.

Based on Section 518's "plain text," Pet. App. 69a, its omission of analogues to TILA's definitions of "the terms 'surcharge,' 'discount,' and 'regular price,'" *id.* at 71a, and a history of "enforcement actions under section 518 * * * inconsistent with [those] federal definitions," *ibid.*, the district court construed the challenged state law to be substantially broader than the expired federal surcharge rule. *Id.* at 68a-72a. In the court's view, even a merchant who displays cash and credit-card prices with "equal prominence" could "legitimately fear prosecution" under Section 518 for describing the difference between the two prices as a "surcharge." *Id.* at 70a. The court also stated that, even under a narrowing construction of Section 518 proffered by respondents, Section 518 would function as "an *anti*-disclosure statute" that would "bar a seller from disclosing its cash price even marginally more conspicuously than its credit-card price." *Id.* at 75a.

The district court concluded that Section 518 "clearly regulates speech, * * * and does so by banning disfavored expression." Pet. App. 73a. It declined to analyze the law's constitutionality using the "lenient standard of review" applicable to consumer-disclosure laws under *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Pet. App. 75a. The court instead treated the law as a prohibition of commercial speech and found it unconstitutional under the test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Pet. App. 75a-79a. The district court also concluded that, "to the extent liability under section 518 turns on the labels that sellers use to describe

their prices, the statute is impermissibly vague." *Id.* at 80a.

d. Respondents appealed, but did not renew their contention that Section 518 is valid under *Zauderer* as a reasonable consumer-disclosure law. See Pet. App. 18a & n.7; Resp. C.A. Br. 24-54; Resp. C.A. Reply Br. 3-25. The court of appeals vacated and remanded with instructions to dismiss petitioners' claims. Pet. App. 1a-47a.

The court of appeals concluded that Section 518, as applied to prohibit a seller from posting a single sticker price accompanied by a proviso about an additional percentage surcharge for using a credit card, does not violate the First Amendment. Pet. App. 18a-28a; see *id.* at 14a-15a. The court understood Section 518, in that context, to "regulate[] conduct"—namely, "a pricing practice"—"not speech." *Id.* at 27a. The court proceeded "from the premise—conceded by [petitioners]—that prices, although necessarily communicated through language, do not rank as 'speech' within the meaning of the First Amendment." *Id.* at 19a. The court reasoned that, as applied to the display of a single price, "[w]hat Section 518 regulates—all that it regulates—is the difference between a seller's sticker price and the ultimate price that it charges to credit-card customers." *Id.* at 21a-22a. The court additionally held that Section 518 is not unconstitutionally vague in that context. *Id.* at 42a-45a.

The court of appeals abstained, under *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941), from deciding whether Section 518 is constitutional as applied to merchants who post separate cash and credit-card prices, or who do not post a price at all. Pet. App. 28a-40a, 45a. The court viewed abstention as

appropriate in light of the court's uncertainty about whether Section 518 "has any applications outside the single-sticker-price context." *Id.* at 36a. The court recognized that TILA's expired surcharge rule had no such applications, *id.* at 31a, but found a "dearth of authority" in the state courts about whether "Section 518 has a broader reach than the federal statute did," *id.* at 32a. The court refused to decide the case based on "speculation that the New York courts might give [Section 518] an expansive and arguably problematic reading." *Id.* at 36a. At the same time, however, the court "decline[d] to speculate" that the state courts would necessarily adopt a narrower construction. *Id.* at 37a. It noted, in particular, that although respondents had "invite[d]" it "to construe Section 518 as being identical to its lapsed federal counterpart if necessary to avoid constitutional difficulties, [respondents] never quite abandon[ed] the position that Section 518 might apply in the absence of a single sticker price." *Id.* at 37a n.13.

SUMMARY OF ARGUMENT

The court of appeals did not correctly analyze petitioners' challenge to N.Y. Gen. Bus. Law § 518. As applied here, Section 518 is properly viewed as a regulation of speech. That state statute may be constitutional, however, either as a permissible consumer-disclosure law (like the former federal surcharge rule), or on some alternative ground. The Court should remand the case for the court of appeals to undertake the appropriate analysis in the first instance.

I. This Court has consistently distinguished economic regulation, which is not subject to First Amendment scrutiny even when it has an indirect effect on

speech, from regulation of speech, which is subject to varying degrees of First Amendment scrutiny depending on the context. Examples of economic regulation include a law that limits a seller's ability to set the price of a good or service, a law that specifies the content or quality of the good or service that the seller provides, or a law that treats a seller's contractual offers as having legally binding effect. Section 518's application here, in contrast, is a regulation of speech, because it addresses the manner in which a merchant may present its pricing scheme to the public.

II. The fact that Section 518 regulates speech does not mean that it is unconstitutional. This Court has reviewed laws directed at commercial speech, such as the advertisement of prices, in a manner that respects the government's broad prerogatives in regulating commerce. In particular, a law requiring only that commercial actors make specified truthful disclosures is constitutional if the "disclosure requirements are reasonably related to the [government's] interest in preventing deception of consumers." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

Under that standard, TILA's expired surcharge rule, 15 U.S.C. 1666f(a)(2) (1982), which required merchants who displayed a cash price to display any higher credit-card price as well, was a valid consumer-disclosure law. Congress could reasonably seek to prevent consumers from being misled by the display of a single unqualified cash price by requiring merchants to disclose their higher credit-card price up front, in dollars-and-cents form. That requirement ensured that customers would receive pricing information in a consistent and easily digestible form,

while allowing merchants to characterize the higher prices as including a "surcharge" or to attempt in other ways to influence customer behavior regarding the use of credit cards.

III. Although the prior TILA surcharge rule was a valid consumer-disclosure requirement, and Section 518 was modeled after that federal provision, respondents did not ask the court of appeals to analyze Section 518 as a consumer-disclosure law. In addition, unresolved questions exist concerning the scope of Section 518's coverage, and resolution of those issues may affect the determination whether Section 518 is constitutional in all of its applications. Consideration of those issues, as well as any additional statutory or constitutional analysis necessary to adjudicate petitioners' claims, would be best conducted by the court of appeals on remand.

ARGUMENT

New York's ban on credit-card surcharges, N.Y. Gen. Bus. Law § 518, prohibits a merchant who posts a single price for an item from charging more than the posted price to a customer who elects to pay by credit card rather than cash. See Pet. App. 14a-15a. Because petitioners' potential liability under Section 518 turns solely on how they would present a lawful pricing differential to consumers, the statute is properly analyzed as a regulation of speech. But to the extent that Section 518 (like the federal surcharge rule that preceded it) simply requires up-front disclosure in dollars and cents of higher prices charged to credit-card customers, it would impose a reasonable and therefore constitutional consumer-disclosure requirement under *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 650-653 (1985). It is unclear, howev-

er, whether the scope of the state law is so limited, and a consumer-disclosure rationale was neither pressed nor passed upon in the court of appeals. This Court should accordingly vacate the judgment below and remand for further proceedings.

I. SECTION 518 REGULATES PETITIONERS' SPEECH

A. Regulation Of Economic Conduct Is Not Regulation Of Speech

Economic regulation of commercial transactions, including regulation of the prices that sellers may charge, is not in itself regulation of speech. "[I]t has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeeper, &c., and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold." *Munn* v. *Illinois*, 94 U.S. 113, 125 (1877). Consistent with the long history of such laws coexisting with the First Amendment, this Court has viewed them as "non-speech-related" forms of regulation that do not raise any First Amendment concerns. *Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357, 372 (2002) (describing limits on drug sales as a constitutionally unproblematic alternative to unconstitutional restrictions on drug advertising); see *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (viewing "direct regulation" to compel "higher prices," or to limit purchases, as "not involv[ing] any restriction on speech"); *id.* at 524 (Thomas, J., concurring in part and concurring in the judgment) (viewing "directly banning a product, * * * controlling its price, or otherwise restricting its sale in specific ways" as "involving no restriction on

speech regarding lawful activity"); *id.* at 530 (O'Connor, J., concurring in the judgment) (viewing restrictions on prices and sales to be consistent with the First Amendment).

B. Laws Regulating Commercial Transactions Are Subject To First Amendment Scrutiny Only When They Have A Non-Incidental Effect On Protected Speech

Even when the regulation of a commercial transaction affects speech, it does not necessarily lose its economic character. As many of this Court's decisions illustrate, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552, 567 (2011).

For example, the Court has found it "beyond dispute" that the application to newspaper publishing of "generally applicable economic regulations," such as antitrust or labor laws, does not "creat[e] constitutional problems." *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 581 (1983). More generally, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (citation omitted). It is accordingly "well established that the Government may restrict speech without affronting the First Amendment" when "false claims are made to effect a fraud." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2547 (2012) (plurality opinion) (citing *Virginia State Bd. of Pharm.* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)).

In other contexts as well, the government may attach legal consequences to speech without triggering First Amendment concerns. Enforcement of contracts, for example, is unproblematic even though liability for any breach depends in part on what the breaching actor has previously promised to do. See, *e.g.*, Fredrick Schauer, *Categories and the First Amendment*, 34 Vand. L. Rev. 265, 270 (1981) (observing that, while parties "make contracts with speech," the First Amendment does not protect the right to "breach contracts"). And even when the common-law prerequisites to contract formation have not been satisfied, the government has broad latitude to require commercial actors to honor representations they have made to the public. A law that simply requires a merchant to honor particular representations *if he chooses to make them* is properly viewed as regulating economic conduct rather than speech.

When a commercial regulation "does not simply have an effect on speech," but is instead aimed more directly at protected speech, it warrants First Amendment scrutiny. *IMS Health*, 564 U.S. at 567; see, *e.g.*, *Wisconsin* v. *Mitchell*, 508 U.S. 476, 487 (1993) (distinguishing between a law "aimed at conduct unprotected by the First Amendment" and a law "explicitly directed at expression"). But even when a challenged law is of the latter sort, the type and stringency of First Amendment review turns in part on "the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 562 (1980) (citation and internal quotation marks omitted); see,

e.g., *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 622-624 (1995); see also, *e.g.*, *Zauderer*, 471 U.S. at 651.

C. Because Section 518 Addresses The Manner In Which Merchants Must Describe Their Prices, That Provision Regulates Petitioners' Speech

In its application to the pricing schemes that petitioners desire to implement, Section 518 is not an economic regulation, but is instead a regulation of speech. It prescribes not the commercial practices a merchant must follow, but the way in which the merchant may communicate those practices to the public.

Although Section 518 might nominally be described as a prohibition on the conduct of "char[ging] an additional amount above the sticker price to * * * credit-card customers," Pet. App. 21a, its application to petitioners turns on the manner in which the "sticker price" conveys the merchant's pricing scheme. Under Section 518, a merchant is free to charge cash customers $100 and credit-card customers $103 for the same item. See *id.* at 14a. If the price tag displays a single dollars-and-cents price of $103, or (potentially) if both prices are displayed with equal prominence, the merchant is deemed to be granting a cash discount, which Section 518 permits. See *id.* at 14a-15a. But if the price tag displays a single dollars-and-cents price of $100, the merchant is deemed to be imposing a credit-card surcharge, which Section 518 forbids. See *ibid.* Because Section 518 addresses the *communication* of an otherwise-permissible pricing scheme, rather than the pricing scheme *itself*, it is properly considered a regulation of speech.

Contrary to the court of appeals' conclusion (Pet. App. 27a), Section 518's application here thus "differs

in a constitutionally significant way" from laws directed at commercial transactions. Section 518 does not "regulate prices," *ibid.*, in the same manner as a law that prohibits a merchant from charging different prices to cash customers and credit-card customers, or that limits the permissible amount of any such difference. See, *e.g.*, *National Ass'n of Tobacco Outlets, Inc.* v. *City of Providence*, 731 F.3d 71, 74, 76-78 & n.1 (1st Cir. 2013) (upholding, as economic regulation, prohibition on charging lower prices to customers with coupons or customers making higher-volume purchases) (cited at Pet. App. 24a, 26a). It also does not regulate the good or service being sold, as would a law requiring that a particular product be sold with a warranty. See, *e.g.*, 38 U.S.C. 3705(a) (requiring warranties for sale of certain homes to veterans). And it does not attach legal consequences to petitioners' commercial communications in a manner that might be analogized to contract law, as would a law that temporarily prohibited a merchant from altering previously offered prices. See, *e.g.*, N.Y. Gen. Bus. Law § 396-r(3)(b)(ii) (McKinney 2012) (anti-price-gouging law) (cited at Pet. App. 27a n.10); cf. 42 U.S.C. 1981 (prohibiting contract-related discrimination).

II. A LAW REQUIRING ONLY THAT SELLERS DISPLAY CREDIT-CARD PRICES ALONGSIDE CASH PRICES WOULD BE A VALID CONSUMER-DISCLOSURE REGULATION

As framed in the petition for a writ of certiorari, the question presented in this case assumes that Section 518 *either* "regulate[s] economic conduct" *or* "unconstitutionally restrict[s] speech." Pet. i. That is a false dichotomy. This Court has declined to interpret the First Amendment to "foreclose restrictions

on potentially or demonstrably misleading advertising," *In re R.M.J.*, 455 U.S. 191, 202 (1982), and has applied a form of reasonableness review to uphold disclosure requirements aimed at preventing consumers from misapprehending the terms of a commercial transaction, see *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 248-253 (2010); *Zauderer*, 471 U.S. at 650-653. A law of that sort may be directed at speech in a way that subjects it to First Amendment scrutiny, yet nevertheless survive First Amendment review. The expired federal surcharge rule, 15 U.S.C. 1666f(a)(2) (1982), which "assure[d] that consumers w[ould] be seeing at least the highest possible price they w[ould] have to pay when they s[aw] a tagged or posted price," 1981 Senate Report 4, and on which Section 518 was at least partially modeled, see Pet. App. 7a-8a, was constitutional under that standard.

A. A Consumer-Disclosure Requirement Is Valid Under The First Amendment If It Is Reasonably Related To Preventing Consumers From Being Misled

This Court has described "advertising the price of a product" as "typical commercial speech." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576 (1988). The degree of scrutiny that applies to regulation of such speech "turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson*, 447 U.S. at 563. In particular, the Court has distinguished between "restrictions on nonmisleading commercial speech regarding lawful activity," which "must withstand intermediate scrutiny," and "disclosure requirement[s]" aimed at preventing the public from being misled, which are sub-

ject to "less exacting scrutiny." *Milavetz*, 559 U.S. at 249; cf., *e.g.*, *American Meat Inst.* v. *United States Dep't of Agric.*, 760 F.3d 18, 21-27 (D.C. Cir. 2014) (en banc) (discussing reasons for applying lesser scrutiny to consumer-disclosure laws serving other governmental interests).

In *Zauderer*, this Court applied that distinction to reject a First Amendment challenge to a requirement that an attorney's advertisement disclose certain costs that clients might incur. See 471 U.S. at 650-653. The Court emphasized the "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. The Court recognized that disclosure requirements do "not attempt[] to prevent [advertisers] from conveying information to the public," but "only require[] them to provide somewhat more information than they might otherwise be inclined to present." *Ibid.* The Court explained that such requirements "trench much more narrowly on an advertiser's interests than do flat prohibitions on speech," because an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.* at 651.

The *Zauderer* Court reiterated the principle, which it had "emphasized" in "virtually all" of its prior "commercial speech decisions," that "'warnings or disclaimers might be appropriately required'" for particular commercial speech "'in order to dissipate the possibility of consumer confusion or deception.'" *Zauderer*, 471 U.S. at 651 (quoting *In re R.M.J.*, 455 U.S. at 201) (brackets omitted). While acknowledging advertisers' interest in avoiding "unjustified or unduly burdensome disclosure requirements," which might "chill[] protected commercial speech," the Court held

that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the [government's] interest in preventing deception of consumers." *Ibid.* Applying that standard to the case before it, the Court described as "deceptive" an advertisement that, although technically accurate, "'had a tendency to mislead.'" *Id.* at 653 (citation and internal quotation marks omitted); see *id.* at 652.

The Court reaffirmed and expanded upon *Zauderer*'s approach in *Milavetz*, *supra*, which upheld statutory requirements for particular disclosures in a law firm's advertisements for certain services. 559 U.S. at 248-253; see *id.* at 233-234. The government in *Milavetz* had "adduced no evidence" that the particular advertisements at issue in the case were misleading. *Id.* at 251. Based on legislative materials showing an overall "pattern of advertisements" that omitted the relevant information, however, the Court found that "the likelihood of deception in these cases 'is hardly a speculative one.'" *Ibid.* (quoting *Zauderer*, 471 U.S. at 652). The Court accordingly viewed the disclosure requirements as a reasonable measure "intended to combat the problem of inherently misleading commercial advertisements." *Id.* at 250.

B. The Expired Federal Surcharge Rule Was A Constitutional Consumer-Disclosure Law

Under the principles set forth in *Zauderer* and *Milavetz*, TILA's now-expired surcharge rule, 15 U.S.C. 1666f(a)(2) (1982), was constitutional. Although it was not explicitly labeled a consumer-disclosure law, the federal surcharge rule operated, and appears to have been intended to operate, to ensure that consumers were adequately informed about

merchants' pricing practices. See 1981 Senate Report 4; see also *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 652 (1994) (subjective motives of legislature irrelevant to constitutional analysis). In particular, the federal rule "permit[ted] merchants * * * to offer a differential between the credit price and the cash price," while "[p]reclud[ing] * * * the possibility that a merchant w[ould] tag or post only the lower price, and thereby charge the customer who pa[id] by credit card a higher price than disclosed." 1981 Senate Report 4.

1. The federal surcharge rule, like Section 518, prohibited "a surcharge on a cardholder who elects to use a credit card." 15 U.S.C. 1666f(a)(2) (1982). Unlike Section 518, however, that federal law contained express definitions of the relevant terms, which made clear that the federal surcharge rule functioned solely as a disclosure requirement.

Pursuant to those definitions, a merchant violated the federal surcharge rule if, but only if, it charged a higher price to credit-card customers, yet displayed only a lower cash price without also displaying the higher credit-card price. TILA defined a "surcharge" as "any means of increasing the regular price to a cardholder" for using a credit card. 15 U.S.C. 1602(q) (1982). Under that definition, no surcharge occurred when the price charged to a credit-card customer equaled the "regular price." *Ibid.* And TILA defined the "regular price" to *be* the credit-card price "if either (1) no price is tagged or posted, or (2) two prices are tagged or posted," one of which is the credit-card price and the other the cash price. 15 U.S.C. 1602(x) (1982). Thus, the only circumstance in which the regular price was *not* the credit-card price—and therefore

the only circumstance in which a "surcharge" could occur—was when the merchant charged different prices to cash and credit-card customers but posted only the lower cash price. See *ibid.*; Pet. App. 15a ("The federal surcharge ban * * * could never be violated unless the seller 'tagged or posted' a single price.").

The federal surcharge rule thus allowed merchants substantial latitude to "choose the manner and method by which they w[ould] tag or post [their] prices." 1981 Senate Report 4. The only constraint was that, "when prices [were] tagged or posted," consumers had to "be exposed to the highest price." *Ibid.*

2. The federal surcharge rule's disclosure requirement was "reasonably related to the [government's] interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. Like the provisions upheld in *Milavetz*, TILA's former surcharge rule "share[d] all the essential features of the rule at issue in *Zauderer*." *Milavetz*, 559 U.S. at 250.

First, as in *Zauderer*, the disclosure required by the former TILA rule "entail[ed] only an accurate statement." *Milavetz*, 559 U.S. at 250. The price a merchant charges to credit-card customers is "purely factual and uncontroversial information about the terms under which [its] services," or its goods, "will be available." *Zauderer*, 471 U.S. at 651.

Second, as in *Zauderer*, the "required disclosure[]" in the federal surcharge rule was "intended to combat the problem of inherently misleading commercial advertisements." *Milavetz*, 559 U.S. at 250. Congress reasonably determined that disclosing only the lower cash price, without notification of the higher credit-card price, could "deceive or mislead the consumer."

1981 Senate Report 4. Under such a scheme, a consumer could "be lured into an establishment on the basis of a 'low, rock-bottom price' only to find at the cash register that the price w[ould] be higher if a credit card [were] used." *Ibid.* Particularly given the testimony that Congress had previously received on the issue of consumer confusion and misperception, see pp. 4-5, *supra*, "the likelihood of" such "deception" was "'hardly * * * speculative.'" *Milavetz*, 559 U.S. at 251 (quoting *Zauderer*, 471 U.S. at 652).

Finally, as in *Zauderer*, the federal surcharge rule "d[id] not prevent" regulated persons "from conveying any additional information," *Milavetz*, 559 U.S. at 250, that they might wish to present. So long as a merchant disclosed its higher credit-card price, the surcharge rule permitted merchants to describe or discuss their pricing schemes in any manner they wished. Nothing in TILA prohibited a merchant from describing the higher credit-card price as including a "surcharge." TILA likewise allowed a merchant to explain that the added amount reflected the merchant's own obligation to remit a percentage of the purchase price to the credit-card issuer, to criticize the credit-card issuer for assessing such a fee, or to exhort customers to pay in cash and deny the credit-card issuer a share of the proceeds.

3. Like many disclosure laws, including the ones upheld in *Milavetz*, see 559 U.S. at 233-234, the federal surcharge rule prescribed a particular format for making the required disclosure. The interaction between the rule and the definition of "regular price" required that the credit-card price be "tagged or posted" as a "price"—*i.e.*, the specific amount, in dollars and cents, that the merchant would charge to a credit-

card customer. 15 U.S.C. 1602(x) (1982); see 15 U.S.C. 1666f(a)(2) (1982). That prescription did not affect the law's constitutionality.

The First Amendment did not require Congress to acquiesce in the desire of merchants who, like petitioners, might have preferred to display only the cash price as a price, and to communicate the additional charge for credit-card purchases solely as a mathematical formula—*e.g.*, a "3% credit-card surcharge," Pet. App. 11a (citation omitted). Nor was Congress required to allow the cash price to be displayed more "conspicuously," *id.* at 75a, than the credit-card price. The authority of the government to require "warnings or disclaimers * * * in order to dissipate the possibility of consumer confusion or deception," *Zauderer*, 471 U.S. at 651 (citation and brackets omitted), includes the power to make a reasonable judgment that one manner of conveying information is likely to be clearer than another.

Thus, in *Zauderer*, the State could require certain explicit disclosures in the context of an advertisement that was technically truthful, subject to the application of a reasonableness standard designed to ensure that the disclosure was not "unjustified or unduly burdensome." 471 U.S. at 651; see *id.* at 652; see *id.* at 653 n.15 (rejecting argument that disclosure requirement was unduly burdensome as applied). If that standard is satisfied, the government need not litigate the adequacy of every alternative form of words that some regulated party might prefer. See *Milavetz*, 559 U.S. at 251 (rejecting challenge to disclosure requirement that "amount[ed] to little more than a preference on [the challenger's] part" for a differently worded statement).

In enacting and revising the federal surcharge rule, Congress reasonably determined that disclosure of the credit-card price as a price, in circumstances where the merchant has already chosen to communicate the cash price as a price, was the best way to avoid consumer deception and confusion. Congress had been informed that "different types of pricing systems from one store to the next may tend to confuse consumers," and that "consumers could find" it "burdensome and confusing" to perform a "mathematical computation" in order to compare prices. *1975 Senate Hearing* 8 (statement of Federal Reserve Board member); see *id.* at 123 (consumer advocate urging that "[c]onsumers should not have to endure the confusion which would result from a wide variety of methods of advertising the price of an item"). A consumer might find it difficult or burdensome to determine the actual cost of an appliance advertised at $369 with a 3.5% credit-card surcharge, or to compare that cost to the cost of the same appliance advertised at $379 at the store across town. To facilitate informed purchasing decisions by consumers, Congress could reasonably require that higher credit-card prices be presented in a concrete and familiar form.

4. Congress could also permissibly focus on one specific type of potential consumer confusion—namely, confusion about additional charges for using a credit card—without simultaneously regulating other aspects of how merchants advertise their prices. This Court has rejected the "argument that a disclosure requirement is subject to attack if it is 'underinclusive'—that is, if it does not get at all facets of the problem it is designed to ameliorate." *Zauderer*, 471 U.S. at 652 n.14. "As a general matter, governments are entitled

to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied. The right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right." *Ibid.* (citation omitted).

The federal surcharge rule was therefore constitutional notwithstanding the absence of similar disclosure requirements for other types of charges, like sales tax, that would affect the total amount paid to purchase an item. Congress could also permissibly differentiate between "surcharge[s]" resulting in credit-card customers paying *more* than the posted price (which had to be disclosed by displaying the credit-card price, see 15 U.S.C. 1666f(a)(2) (1982)) and "discount[s]" resulting in cash customers paying *less* than the posted price (which could potentially be disclosed in other ways, so long as the disclosure was "clear[] and conspicuous[]," 15 U.S.C. 1666f(b) (1982)). Congress enacted the TILA surcharge rule after being informed that "the disclosure problem" is "aggravate[d]" in the former circumstance, which presents the possibility of "something akin to the troublesome 'bait and switch' technique," in which a customer is enticed by a misleadingly low price. *1975 Senate Hearing* 86 (statement of banking organizations). In the latter circumstance, by contrast, the customer will, "at worst," "arrive[] at a store" to find "that the cash price is *lower* than was advertised." *Ibid.*

The federal surcharge rule's targeted disclosure requirement was different from the "content-based restrictions on speech," like the differential regulation of signs with different messages that the Court recently invalidated in *Reed* v. *Town of Gilbert*, 135

S. Ct. 2218 (2015), that are subject to "strict scrutiny," *id.* at 2231; see *id.* at 2224. The Court's rejection of underinclusivity challenges to consumer-disclosure laws, see *Zauderer*, 471 U.S. at 652 n.14, accords with the broader principle that distinctions in the context of commercial speech are "neutral enough" to avoid strict scrutiny when they are premised on "one of the characteristics of commercial speech"—here, its potential to mislead—that "justifies depriving [commercial speech] of full First Amendment protection" in the first place, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992). Thus, "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there." *IMS Health*, 564 U.S. at 579 (quoting *R.A.V.*, 505 U.S. at 388-389); see *ibid.* (observing that the "principle" that "content-based restrictions on protected expression are sometimes permissible * * * applies to commercial speech"). And, as explained above, the former TILA rule also differed from typical "restrictions on speech" in that it did not forbid the communication of any information that a merchant wished to convey. Rather, it simply required the provision of *additional* information (the credit-card price, stated as a price) if the merchant engaged in differential pricing and chose to post the lower cash price.

5. As with any "warning[]," "disclaimer[]," or other type of disclosure that the government might reasonably require, *Zauderer*, 471 U.S. at 651 (citation omitted), the disclosure previously mandated by the federal surcharge rule could have affected a consumer's perception of a proposed commercial transaction and his willingness to engage in it. But because any such

effect would be the result of additional truthful information that Congress reasonably deemed necessary to prevent consumers from being confused or misled, the rule was consonant with the First Amendment.

The disclosure requirements in *Zauderer*, for example, were held to be constitutional even though many prospective clients would doubtless be warier of engaging an attorney's services if informed about additional potential costs. See 471 U.S. at 650-653. That approach recognizes that "protection for commercial speech is justified in large part by the information's value to consumers," *Milavetz*, 559 U.S. at 249, and reflects that "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information," *Ibanez* v. *Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994) (citation and internal quotation marks omitted).

The Court's approach also recognizes that consumer-disclosure laws leave ample room for a regulated entity to use its preferred terms to characterize a transaction. See *Milavetz*, 559 U.S. at 249. The *Zauderer* standard applies only to the extent that a law requires the effective disclosure of information. To the extent that a law limits a regulated entity's ability to provide "additional information" that is neither false or misleading, the law is subject to more exacting First Amendment scrutiny. *Id.* at 250. In this case, for example, petitioners wish to discourage credit-card purchases by describing higher credit-card prices as a penalty and taking advantage of a psychological propensity to attach higher priority to avoiding losses than to achieving gains. See Pet. Br. 6-8. Under the former TILA surcharge rule, they would have been

free to do so. Any law that prohibited the use of such terms would be analyzed under *Central Hudson* rather than under *Zauderer*, and it would require a justification separate from the government interests that underlay the federal surcharge rule. See, *e.g.*, *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 480-491 (1995) (applying *Central Hudson* to ban on displaying alcohol content on beer labels).

6. Petitioners err in suggesting (Br. 48-49) that the former federal law was unconstitutionally vague. The constitutional vagueness inquiry turns not on whether there is an abstract "economic distinction" between surcharges and discounts, Pet. Br. 48 (citation omitted), or on whether people might seek agency guidance in some circumstances, *id.* at 13 n.3, 48-49, but instead on whether the law itself "provide[s] a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 18 (2010) (*HLP*) (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008)). The language in the federal surcharge rule bore no resemblance to "the sorts of terms," involving "'wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings,'" that this Court "ha[s] previously declared to be vague." *Id.* at 20 (quoting *Williams*, 553 U.S. at 306).

As discussed above, the statutory definitions made clear that what was prohibited was to "tag or post[]" the cash "price" without similarly "tag[ging] or post[ing]" any higher credit-card "price." 15 U.S.C. 1602(x) (1982); see *HLP*, 561 U.S. at 21 (relying on statutory definitions in rejecting vagueness chal-

lenge). Even if there were some ambiguity on the margins as to what constituted "tag[ging]" or "post[ing]," see, *e.g.*, 43 Fed. Reg. 3899 (Jan. 30, 1978) (addressing "unique" situation of gas stations under Federal Reserve regulations), "perfect clarity and precise guidance have never been required even of regulations that *restrict* expressive activity," *Williams*, 553 U.S. at 304 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989)) (emphasis added), let alone consumer-disclosure laws.

III. THIS CASE SHOULD BE REMANDED FOR FURTHER CONSIDERATION OF THE SCOPE OF, AND JUSTIFICATIONS FOR, SECTION 518

Although New York's Section 518 was modeled on a prior federal law (the expired TILA surcharge rule) that was constitutional under the *Zauderer* framework, it does not necessarily follow that the less-specific state law is likewise valid. Respondents argued in the district court that Section 518 is a consumer-disclosure law subject to reasonableness review under *Zauderer*, but they did not renew that argument in the court of appeals. Compare, *e.g.*, 13-cv-03775 Docket entry No. 27, at 38-39 (S.D.N.Y. July 12, 2013) (motion to dismiss), with, *e.g.*, Resp. C.A. Br. 24-54. And *Zauderer*'s application to Section 518 depends on the resolution of an antecedent (and currently unresolved) issue of statutory construction—*i.e.*, whether Section 518 forbids the use of terms like "surcharge" or "penalty" to describe a merchant's pricing differential, even when both the credit-card price and the cash price are disclosed to consumers.

Respondents contend (Br. in Opp. 3) that "the [New York] Legislature made clear that [Section 518] should be construed identically to the prior federal

law." But Section 518 omits the relevant definitional provisions of TILA, and respondents appear to acknowledge that the state courts might construe it more broadly than its federal predecessor. See *id.* at 19-20; see also *People* v. *Fulvio*, 517 N.Y.S.2d 1008, 1015 (N.Y. Crim. Ct. 1987) (stating that a merchant "faces the prospect of criminal conviction" for "describ[ing] the higher price in terms which amount to the 'credit price' having been derived from adding a charge to the lower price") (emphasis omitted). The district court refused to interpret Section 518 to be congruent to the expired federal surcharge rule, concluding, *inter alia*, that such a construction "strays markedly from the ordinary plain meaning of [Section 518's] text." Pet. App. 80a; see *id.* at 68a-72a. The court of appeals declined to resolve that interpretive issue, and it accordingly abstained from deciding whether a state law that prohibited the use of terms like "surcharge" or "penalty" would violate the First Amendment. See *id.* at 28a-40a; see also *id.* at 37a n.13 (observing that respondents had "never quite abandon[ed] the position that Section 518 might apply in the absence of a single sticker price"). It also abstained from addressing petitioners' vagueness challenge. *Id.* at 45a.

This Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The Court would provide an appropriate level of guidance on the question presented in this case by clarifying that Section 518 regulates speech, but that a sufficiently specific law requiring only that a merchant display a credit-card price alongside a cash price would be a valid consumer-disclosure regulation. The Court could then remand for the court of appeals,

which is particularly well-situated to address (or certify) questions of state law, see, *e.g.*, *Butner* v. *United States*, 440 U.S. 48, 58 (1979), to determine the grounds on which respondents are defending Section 518 and to evaluate the statute's constitutionality in light of those defenses.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

1. N.Y. Gen. Bus. Law § 518 (McKinney 2012) provides:

Credit card surcharge prohibited

No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.

Any seller who violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or a term of imprisonment up to one year, or both.

2. 15 U.S.C. 1602 (1982) provided in pertinent part:

Definitions and rules of construction

* * * * *

(k) The term "credit card" means any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

* * * * *

(m) The term "cardholder" means any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person.

(n) The term "card issuer" means any person who issues a credit card, or the agent of such person with respect to such card.

* * * * *

(p) The term "discount" as used in section 1666f of this title means a reduction made from the regular price. The term "discount" as used in section 1666f of this title shall not mean a surcharge.

(q) The term "surcharge" as used in this section and section 1666f of this title means any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means."

* * * * *

(x) As used in this section and section 1666f of this title, the term "regular price" means the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of an open-end credit plan or a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of an open-end credit plan or a credit card and the other when payment is made by use of cash, check, or similar means. For purposes of this definition, payment by check, draft, or other negotiable instrument which may result in the debiting of an open-end credit plan or a credit cardholder's open-end account shall not be considered payment made by use of the plan or the account.

* * * * *

3. 15 U.S.C. 1666f (1982) provided:

Inducements to cardholders by sellers of cash discounts for payments by cash, check or similar means; credit card surcharge prohibition; finance charge for sales transactions involving cash discounts

(a) Cash discounts

(1) With respect to credit card which may be used for extensions of credit in sales transactions in which the seller is a person other than the card issuer, the card issuer may not, by contract, or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card.

(2) No seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means.

(b) Finance charge

With respect to any sales transaction, any discount from the regular price offered by the seller for the purpose of inducing payment by cash, checks, or other means not involving the use of an open-end credit plan or a credit card shall not constitute a finance charge as determined under section 1605 of this title if such discount is offered to all prospective buyers and its availability is disclosed clearly and conspicuously.

RECORD AND BRIEF

No. 15-1391

FILED

IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM AND DAVID ROSS,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW YORK; CYRUS R. VANCE , JR., IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF NEW YORK COUNTY; KENNETH P. THOMPSON, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF KINGS COUNTY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CONSUMER ACTION, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AND U.S. PUBLIC INTEREST RESEARCH GROUP AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321 (2008) ..... *passim*

Adam J. Levitin, *Priceless? The Social Costs of No-Surcharge Rules*, Business, Economics and Regulatory Policy Working Paper Series No. 973974 (Jan. 2008 Revision)..... *passim*

Andrew Ching & Fumiko Hayashi, Federal Reserve Bank of Kansas City, *Payment Card Rewards Programs and Consumer Payment Choice*, Working Paper No. 06-02 (2006) 11

Andrew Martin, *Card Fees Pit Retailers Against Banks*, N.Y. Times (Jul. 15, 2009).....5

Associated Press, *Consumers Take on More Debt*, N.Y. Times (Jul. 9, 2012).....15

Average Merchant Fees for Debit, Credit and Charge Cards, Reserve Bank of Australia Payment Statistics, Bulletin Table C3 14

Burney Simpson, *Merchants Tackle Credit Card Fee Policies*, Cards & Payments (Jan. 2006) 10

David S. Evans & Richard Schmalensee, Interchange Fees in Credit and Debit Card Industries, Proceedings of the 2005 Federal Reserve Bank of Kansas City Conference, *The Economics of Interchange Fees and Their Regulation: An Overview* (2005) 5, 13

Table of Authorities (Continued)

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Efraim Berkovich, *Card Rewards and Cross-Subsidization in the Gasoline and Grocery Markets*, REV. OF NETWORK ECON. 11.4 (2012) 11

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Merchant Discount Fees, NILSON REP., Aug. 2006.....9

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Oren Bar-Gill, *Seduction by Plastic*, 98 Nw. U. L. Rev. 1373 (2004) 16

Scott Schuh et al., FEDERAL RESERVE BANK OF BOSTON, *Who Gains and Who Loses from Credit Card Payments?* (2010) 7, 10, 11

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Stuart E. Weiner & Julian Wright, *Interchange Fees in Various Countries: Developments and Determinants*, 4.4 REV. OF NETWORK ECON. 299 (2005) 14

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Terri Bradford & Fumiko Hayashi, FEDERAL RESERVE BANK OF KANSAS CITY PAYMENTS SYSTEM RESEARCH BRIEFING, *Developments in Interchange Fees In the United States and Abroad* (Apr. 2008).....14

U.S. Interchange Fees, NILSON REP., May 2003.....9

William C. Dunkelberg & Robert H. Smiley, *Subsidies in the Use of Revolving Credit*, 7.4 J. MONEY CREDIT & BANKING 477 (1975).....10

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INTEREST OF *AMICI CURIAE*

Amici curiae are three leading consumer advocacy groups whose decades of collective experience advocating for consumers make them qualified to assist the Court in understanding the substantial public interest at issue here. Amici have broad knowledge about the history of credit cards and are particularly well qualified to assist the Court in understanding how the public interest, and consumers' economic interests in particular, are undermined by no-surcharge laws, which were originally advanced by the credit card industry, and by similar bills that are being introduced and lobbied for by the industry in various other states on an ongoing basis.[1]

Consumer Action has been educating consumers on credit card related matters, including credit card surcharges, for more than four decades. Consumer Action has been a champion of underrepresented consumers since 1971. A national, nonprofit 501(c)(3) organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change particularly in the fields of credit, banking, housing, privacy, insurance and utilities.

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[1] Counsel for Amici provided counsel for the parties timely notice of intent to file this brief, and the parties have consented. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to their preparation or submission.

National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices.

U.S. Public Interest Research Group (U.S. PIRG), the federation of state Public Interest Research Groups, is a national, nonprofit, non-partisan consumer advocacy organization that stands up to powerful special interests on behalf of the American public. U.S. PIRG has long advocated on the issue of swipe fee reform. U.S. PIRG believes that cash customers should not pay more to subsidize credit card reward programs and supports efforts to make the costs of credit transparent to consumers.

INTRODUCTION AND SUMMARY OF ARGUMENT

American merchants pay the highest fees on credit card transactions in the world, fees that are many times higher than the fees paid by merchants in most other developed countries. It is estimated that merchants incur upwards of $50 billion in swipe fees per year. Merchants have no choice but to pass on these credit card costs to consumers in the form of higher retail prices on the goods and services they purchase every day. The main reason that there is not more awareness and outcry about this issue is that swipe fees are hidden from consumers.

New York and nine other states prohibit merchants from communicating to consumers that they are charging a separate fee to account for the costs of credit card acceptance. By prohibiting merchants from informing consumers about the costs of credit card use, no-surcharge laws hinder consumers' ability to make meaningful and cost conscious decisions about payment choice. No-surcharge laws deprive merchants of a valuable tool that could otherwise be utilized to help remedy the grossly inefficient and anticompetitive payment system.

Amici here support the petition for certiorari in order to address the split in the Circuit Courts of Appeal that unless resolved will continue to detrimentally affect American consumers.

ARGUMENT

I. NO-SURCHARGE LAWS FORCE MERCHANTS TO RECOUP SUPRA-COMPETITIVE SWIPE FEES BY RAISING STICKER PRICES FOR ALL CONSUMERS.

To adequately understand the policy considerations relating to no-surcharge laws, one must first understand the merchant fees that comprise the underlying problem. Every time a consumer uses a credit card, the merchant pays 1–4%[2] of the transaction value in "swipe fees," most of which go to the issuing bank as "interchange fees."[3] Interchange fees in America are the highest in the world, generating approximately 50 billion dollars per year for credit card issuers, with more than 200 million dollars of it from federal agencies alone.[4] Interchange fee rates jumped

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[2] These fees are usually a hybrid of a per-transaction price and a percent of transaction cost, and sometimes can reach 15%, depending on the risk factor of the merchant. *See* Elizabeth Warren, *Antitrust Issues in Credit Card Merchant Restraint Rules*, Tobin Project Risk Policy Working Group, 1 (May 6, 2007) *available at* http://www.docstoc.com/docs/26252409/Antitrust-Issues-in-Credit-Card-Merchant-Restraint-Rules.

[3] These fees are technically divided between three banking entities, but for the purposes of this brief, the technical structure of credit card payment systems is irrelevant. *See* Adam J. Levitin, *Priceless? The Social Costs of No-Surcharge Rules*, Business, Economics and Regulatory Policy Working Paper Series No. 973974, 7 (Jan. 2008 Revision) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1004396.

[4] *See, e.g.*, Keith Bradsher, *U.S. Looks to Australia on Credit Card Fees*, N.Y. TIMES (Nov. 24, 2009), http://www.nytimes.com/2009/11/25/your-money/credit-and-debit-cards/25card.

23% between 2000 and 2006, and because the volume of credit card transactions also increased dramatically, the absolute cost of interchange fees for merchants increased 139% during the same period.[5] "For many merchants, credit card acceptance has become the fastest growing cost of doing business."[6]

No-surcharge rules have helped to enable credit card use to increase despite being "more expensive on average for merchants than cash and checks,"[7] by limiting merchants' ability to pass these fees to the consumers who choose to use credit cards. By returning a small portion of the swipe fee revenues in the form of points to a fraction of consumers who participate in credit card rewards programs, credit card companies have constructed a system whereby consumers actively, and unknowingly, choose the most costly payment system. Increased swipe

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html?pagewanted=all; Andrew Martin, *Card Fees Pit Retailers Against Banks*, N.Y. TIMES (Jul. 15, 2009), http://www.nytimes.com/2009/07/16/business/16fees.html.

[5] Levitin, *supra* note 3, at 49.

[6] Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. REV. 1321, 1345 (2008) (citing *Financial Services Issues: A Consumer's Perspective, Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Institutions*, 108th Cong. 115 (2004) (statement of John J. Motley III, Sr. Vice President, Food Marketing Institute)).

[7] David S. Evans & Richard Schmalensee, INTERCHANGE FEES IN CREDIT AND DEBIT CARD INDUSTRIES, PROCEEDINGS OF THE 2005 FEDERAL RESERVE BANK OF KANSAS CITY CONFERENCE, *The Economics of Interchange Fees and Their Regulation: An Overview*, 96 (2005), *available at* http://ssrn.com/abstract=744705.

fees fuel greater rewards, which fuel greater use, in a race to the top—precisely the opposite of competitive pricing.

This potent combination of greater demand for credit card use and increasing swipe fees has forced merchants to increase retail sticker prices to all consumers to recoup their credit card costs. "[H]undreds of thousands of merchants . . . must take credit cards at any price because their customers insist on using those cards." *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 341 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003).[8] Simultaneously, no-surcharge laws impede merchants' ability to communicate and allocate the cost of credit card usage to the consumers who impose the cost by choosing to pay with credit cards.[9] To cover the costs of credit card merchant fees, merchants are forced to raise

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[8] *See also* General Court of the European Union, T-111/08, *MasterCard Inc. et al., v. Comm'n* (2012) 28 ("[T]he MasterCard payment organisation [sic] collectively exert market power vis-à-vis merchants and their customers.") *available at* http://curia.europa.eu/juris/liste.jsf?num=T-111/08&language=EN.

[9] While merchants are technically allowed to discount in favor of other payment forms, discounting is not always economically feasible for merchants because of an "installed-base" problem associated with many payment forms. For example, if a merchant today implemented a 2% discount off the retail price for debit card usage, this discount would apply to all debit transactions, and not just those debit transactions in which the consumer would have otherwise paid with a credit card. For the approximately 40% of consumers that would have already paid with a debit card regardless of the discount, the 2% discount represents a loss to the merchant. It would be very difficult to offset this substantial loss with actual usage shifts in favor of debit cards. Because of this, it might not make economic sense for merchants to discount in favor of mature payment products with significant market share.

the unified sticker prices for all their goods. Cash buyers pay higher retail prices than they otherwise should, while credit card customers are discounted from the true cost of their transaction. Credit card consumers receive all the benefits of credit card use, while cash customers receive no benefit and pay a premium to cover the difference—a pervasive cross-subsidy operating on all transactions. As Elizabeth Warren has put it: No-surcharge rules operate to force most merchants "to charge *all* consumers higher prices in order to cover the costs of accepting credit card transactions. As a result, non-credit consumers (food stamps, cash, checks, debit) end up subsidizing credit card consumers and, indirectly, subsidizing the entire credit card industry."[10] The estimated overall cross-subsidy between cash and credit users is staggering: "On average, each cash buyer pays $149 to card users and each card buyer receives $1,133 from cash users every year."[11]

The explosion in rewards card programs has exacerbated the problem of hidden cross-subsidies considerably. "Rewards cards have risen from less than 25 percent of new card offers in 2001 to nearly 60 percent in 2005" and now are considered to "drive the growth in . . . all credit card usage."[12] The power of rewards to increase credit card usage—though vitally, not to increase overall consumer spending—is closely tied with increases in swipe fees. In fact, rewards cards and corporate cards sometime

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[10] Warren, *supra* note 2, at 1.

[11] *See* Scott Schuh et al., FEDERAL RESERVE BANK OF BOSTON, *Who Gains and Who Loses from Credit Card Payments?:* 3 (2010) *available at* https://www.bostonfed.org/economic/ppdp/2010/ppdp1003.pdf.

[12] Levitin, *supra* note 6, at 1344–46.

cost merchants twice as much in fees.[13] In 2007, Visa's ultra-premium rewards card's interchange rate at large supermarkets—among the merchants with theoretically the most leverage to negotiate fees—was 2.20% plus 10¢ per transaction, roughly double the average interchange fee.[14] Likewise, MasterCard's premium rewards card's interchange is as much as 3.25% per transaction.[15]

Far from being a problem for credit card networks, the across-the-board price increases work in their favor: "Card networks have the incentive to charge high interchange fees to inflate retail prices so that they can create more demand for their service . . . . As the card payments become more efficient and convenient than alternatives, the card networks are able to further raise the interchange fees, inflate the value of transactions and hence extract more profits" without lifting consumer surplus and merchant profits.[16] Neither merchants nor non-credit card users gain any marginal benefit from these high-end rewards cards, but they both end up footing the bill for immense credit card company profits, and the generous rewards they provide to a tiny segment of consumers.

No-surcharge laws thus help to gag merchants and deny consumers vital information about the relative costs

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[13] Levitin, *supra* note 6, at 1323.

[14] Levitin, *supra* note 6, at 1348.

[15] Levitin, *supra* note 6, at 1333.

[16] Zhu Wang, Federal Reserve Bank of Kansas City, *Market Structure and Credit Card Pricing: What Drives the Interchange?*, 7 (2007), *available at* http://www.frbatlanta.org/news/CONFEREN/08payments/08payments_Wang.pdf.

of payment forms, ensuring that cards are never put into serious price competition with each other or with other payment forms. Price signals, as this case demonstrates, are essential to a free market economy. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977). In a less competitive environment, companies have less incentive to price competitively and prices therefore increase. *Id.* at 377-78. Commercial speech restraints like the ones at issue thwart price competition. Thus, credit card companies will continue to engage in a race to the top by increasing swipe fees, without concern that consumer usage will be impacted.[17] No-surcharge laws aid in maintaining unified pricing at the point-of-sale, concealing from consumers that credit card users are free riding on cash consumers and simultaneously driving retail prices up. Meanwhile, merchants have no choice but to accept credit card networks' swipe fee increases.

II. THE CROSS SUBSIDIES CREATED BY NO-SURCHARGE LAWS ARE HIGHLY REGRESSIVE.

Credit card companies direct a small fraction of their supra-competitive profits to their richest customers at the cost of low-income consumers, effectively implementing a regressive tax on all consumers. Consumers using "cash"—which for purposes of this brief includes checks, debit cards, and food stamps—unknowingly pay a premium that subsidizes the credit card networks and their high income consumers. The distribution of benefits

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[17] Levitin, *supra* note 6, at 1341 (citing Merchant Discount Fees, NILSON REP., Aug. 2006, at 11; U.S. Interchange Fees, NILSON REP., May 2003, at 10).

is no accident: credit card companies almost exclusively target affluent consumers and corporate accounts for the most generous rewards.[18]

On average, cash consumers are far lower income, and embrace a larger proportion of minorities, than credit card users.[19] Ten percent of adult Americans are completely "unbanked" and therefore ineligible for credit cards.[20] Within the lowest income quintile of Americans, 29% are unbanked.[21] Credit cards are also disproportionately unavailable to minorities: "While less than 5% of the white, non-Hispanic population lacks a bank account, 20% of non-whites and Hispanics are unbanked."[22] Approximately 40% of the lowest income quintile of Americans have a credit card, while 67% households with income of $20-$50 thousand dollar per year, and 97% of households over earning over $120 thousand per year, have at least one credit card.[23] Naturally, the distribution of access to credit cards means that this cross-subsidy overwhelmingly benefits high income consumers: "credit card spending by high-income consumers is nearly five times higher than

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[18] Levitin, *supra* note 6, at 1346 n.76 (citing Burney Simpson, *Merchants Tackle Credit Card Fee Policies*, CARDS & PAYMENTS, 32 Jan. 2006).

[19] *Id.*; *see also* William C. Dunkelberg & Robert H. Smiley, *Subsidies in the Use of Revolving Credit*, 7.4 J. MONEY CREDIT & BANKING 477 (1975).

[20] Warren, *supra* note 2, at 1.

[21] Levitin, *supra* note 3, at 44.

[22] *Id.*

[23] Schuh, *supra* note 11, at 8.

credit card spending by low-income consumers, and . . . high-income consumers are 20 percentage points more likely to receive credit card rewards."[24] No-surcharge laws help facilitate this massive transfer of resources from cash users to credit card users, and even among credit card users, from low-income, low-rewards card users to high-income, high-rewards card users. Not having to bear the full costs of their usage, rewards card users use credit cards more often and more exclusively than those without rewards credit cards.[25] "By far, the bulk of the transfer gap is enjoyed by high-income credit card buyers [income $100k+], who receive a $2,188 subsidy every year," as opposed to the low income credit card buyers, who "receive a subsidy [of] $613."[26] In absolute terms, the estimated transfer is about $1.4 billion to $1.9 billion from non-rewards consumers to rewards consumers on gasoline and grocery purchases alone.[27] Together, the no-surcharge laws' support a lack of transparency and run-away rewards programs (also facilitated by no-surcharge laws), which are largely responsible for this enormous regressive and hidden wealth transfer. In effect, this allows credit card companies to tax the poor and give a small share of those proceeds to the rich.

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[24] Schuh, *supra* note 11, at 8.

[25] Andrew Ching & Fumiko Hayashi, FEDERAL RESERVE BANK OF KANSAS CITY, *Payment Card Rewards Programs and Consumer Payment Choice*, Working Paper No. 06-02, 4 (2006), *available at* http://www.kansascityfed.org/PUBLICAT/PSR/ RWP/ching_hayashi_paper.pdf.

[26] Schuh, *supra* note 11, at 21.

[27] *Id.* at 3 (citing Efraim Berkovich, *Card Rewards and Cross-Subsidization in the Gasoline and Grocery Markets*, REV. OF NETWORK ECON. 11.4 (2012)).

III. THE EXISTENCE OF NETWORK EFFECTS DOES NOT JUSTIFY NO-SURCHARGE LAWS.

In analyzing no-surcharge laws, economic theorists have vastly overemphasized the importance of "network effects"—the idea that credit cards increase in value based on the number of merchants and consumers who use them—in analyzing the laws' impact on consumer welfare.[28] These theories can only be employed as a defense of no-surcharge rules under the woefully myopic belief that positive network effects are the *only* consequence of increased credit card spending. In fact, if surcharging caused a decrease in credit card usage, it undoubtedly would increase overall consumer welfare because: first, some transactions will likely be diverted to other more inexpensive payment forms, like debit, which have their own network effects that will offset "harm" to credit card networks; second, credit card usage has specific externalities which undermine the facile assumption that more credit card debt means more consumer welfare.

A. Increased Use of Other Payment Forms, Like Debit Cards, Along With Reductions in Swipe Fees, Will More than Offset the Welfare Costs of Decreased Credit Card Usage.

Surcharging will create genuine competition between payment forms, benefiting debit card users and driving down swipe fees for everyone. Many other payment forms are subject to network effects, meaning that the diverted credit card usage would create comparable welfare gains in other networks. The marginal loss to credit card users would be offset by the benefits to debit users. In fact, for

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[28] *See* Levitin, *supra* at note 6, at 1385–90.

newer payment forms, adoption matters a great deal more. By the time networks are as well-established and mature as credit cards, "the adoption and usage externality has become less important."[29] The qualities that most consumers cite as their reasons for using credit cards – convenience, security from theft, widespread acceptance, speed at checkout – are fully replaceable by other payment forms like debit cards, at *half* the cost.[30]

States have no legitimate interest in artificially sparing credit cards from free and open competition with other payment forms. If no-surcharge laws are necessary to maintain credit cards' position vis-à-vis other payment forms, it is preserving a market failure that substantially harms consumers. The Supreme Court has rejected state attempts to restrict advertising based on the "fear that people would make bad decisions if given truthful information." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 359 (2002); *Bates*, 433 U.S. at 364 (holding that commercial speech "performs an indispensable role in the allocation of resources in a free enterprise system"). In fact, the most likely and significant outcome of allowing merchants to surcharge is decreased swipe fees. There is evidence that "no surcharge rules increase the price of all other payment system to match the price of credit cards,"[31]

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[29] Wang, *supra* note 16, at 33.

[30] Evans & Schmalensee, *supra* note 7, at 96-97. Many debit cards actually offer superior security through the use of pin systems and because debit card fraud does not affect a consumer's credit report, whereas credit card fraud does. Levitin, *supra* note 5, at 1387.

[31] Levitin, *supra* note 6, at 1358 (citing Joseph Farrell, *Efficiency and Competition Between Payment Instruments*, 5 Rev. Network Econ. 26, 31 (2006)). Under current common contract

explaining why "interchange fees in the United States are more than double those in some other countries (Australia, EU cross-border, and the UK)."[32] Australia's relatively recent ban on no-surcharge rules immediately led to increased debit usage, while the average swipe fee fell by nearly half, across the board.[33] Significantly, it also led to increased volume on its network.[34] Moreover, even without no-surcharge rules, credit card companies continue to profit in Finland, the Netherlands, Portugal, Sweden, the United Kingdom, Switzerland, and Australia.[35] In fact, MasterCard voluntarily rescinded its own no-surcharge rule for Europe in 2005.[36]

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terms, no credit card issuer would benefit from lifting the restraints unilaterally because the other, presumably more costly, credit card companies would still be protected by their own no surcharge rules. *See* Levitin, *supra* note 5, at 1359.

[32] Stuart E. Weiner & Julian Wright, *Interchange Fees in Various Countries: Developments and Determinants*, 4.4 REV. OF NETWORK ECON. 299 (2005) *available at* https://www.academia.edu/3095968/Interchange_Fees_in_Various_Countries_Developments_and_Determinants.

[33] RESERVE BANK OF AUSTRALIA PAYMENT STATISTICS, BULLETIN TABLE C3, AVERAGE MERCHANT FEES FOR DEBIT, CREDIT AND CHARGE CARDS, http://www.rba.gov.au/statistics/tables/xls/c03hist.xls.

[34] Levitin, *supra* note 3, at 61.

[35] Levitin, *supra* note 6, at 1389. For an overview of global regulation of interchange fees, *see* Terri Bradford & Fumiko Hayashi, FEDERAL RESERVE BANK OF KANSAS CITY PAYMENTS SYSTEM RESEARCH BRIEFING, *Developments in Interchange Fees In the United States and Abroad*, (Apr. 2008),*available at* http://www.kansascityfed.org/publicat/psr/briefings/psr-briefingApr08.pdf.

[36] *Surcharging in Europe*, NILSON REP., Sept. 2004, at 6–7.

In light of these real world examples, it is impossible to say with a straight face that no-surcharge rules really help consumers. No-surcharge laws may be vital to the preservation of supra-competitive profit margins for credit card companies, but there is no economic theory that can twist this interest into a pro-consumer justification of the law.

B. Overconsumption of Credit Card Debt Causes Uniquely Harmful Social Externalities.

A supposedly pro-consumer defense of no-surcharge laws based on spurring expanded use of credit cards is radically out of step with the facts of credit card debt consumption. Credit card debt in America was $870 billion by May of 2012.[37] Moreover, "Americans racked up nearly $48 billion in new credit card debt in 2011, 424 percent more than what they charged in 2010, and 577 percent more than in 2009. Although total outstanding credit rose only about $4 billion, that number was largely offset by the magnitude of consumer defaults—*$44.2 billion worth.*"[38] As a result of a phenomenon unique to credit card debt, consumers consistently underestimate both the credit debt they already hold, and the costs they will eventually incur. In 2011, Americans held an average of $7,134 in credit card debt per household, but reported themselves as having an average of $2,000 less.[39] Credit card usage

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[37] The Associated Press, *Consumers Take on More Debt*, N.Y. Times, (Jul. 9, 2012), *available at* http://www.nytimes.com/2012/07/10/business/credit-card-debt-climbed-by-8-million-in-may.html?_r=0.

[38] Meg Handly, *Consumers Still Buried In Credit Card Debt*, U.S. News and World Report (Mar. 12, 2012)

[39] Meta Brown et al., Federal Reserve Bank of New York, *Do We Know What We Owe? A Comparison of Borrower- and Lender-*

is also causally linked to personal bankruptcy, and credit card companies target bankrupt and near-bankrupt households with predatory offers.[40] Following the ban on no-surcharge rules, Australia saw a 43% decrease in the gross of credit card debt.[41] A comparable reduction in the growth of American credit card debt, far from being a cost of surcharging, would be a highly desirable side effect.

IV. THE PETITION SHOULD BE GRANTED TO RESOLVE THE CIRCUIT SPLIT AND ALLOW MERCHANTS TO FREELY AND ACCURATELY CONVEY PRICING INFORMATION TO CONSUMERS.

The Second and Fifth Circuits have both held that the nearly identical no-surcharge laws of New York and Texas, respectively, regulate conduct and not speech and therefore do not implicate the First Amendment. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 131 (2d Cir. 2015); *Rowell v. Pettijohn*, 816 F.3d 73, 82 (5th

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Reported Consumer Debt, (Oct. 2011), *available at* http://www.newyorkfed.org/research/staff_reports/sr523.pdf; *see also* Oren Bar-Gill, *Seduction by Plastic*, 98 Nw. U. L. Rev. 1373, 1396–402 (2004); Levitin, *supra* note 3, at 50–52 (describing various studies outlining consumer under appreciation of the cost of credit).

[40] *See* Teresa A. Sullivan, Elizabeth Warren, Jay Lawrence Westbrook *Credit Cards* at 108, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT, Yale University Press (2000), (outlining the connection between credit card usage and bankruptcy); Levitin, *supra* note 3, at 43.

[41] *See* Adam J. Levitin, *The Antitrust Superbowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 BERK. BUS. L. J. 69, 137 (2006).

Cir. 2016). These rulings effectively prohibit merchants from communicating to consumers the true costs of credit card acceptance. And so, to recoup these costs, merchants are forced to bake them into their retail prices and cash-paying consumers end up overpaying – without their knowledge. The upshot is that swipe fees will remain hidden from consumers in New York and Texas, unless this Court intervenes.

The Eleventh Circuit, on the other hand, has recognized that Florida's no-surcharge law was not a regulation of pricing but "an unconstitutional abridgement of free speech." *Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1251 (11th Cir. 2015). The import of this ruling is that merchants in Florida are now allowed to accurately inform consumers about the costs of credit card transactions by communicating that there is a separate charge for credit card usage.

There is a clear split in the Circuit Courts of Appeal that needs to be addressed. As it currently stands, consumers in several states remain blind to the true cost of credit card transactions and merchants are prohibited from providing that information to them. It is critically important for all American merchants to be able to accurately convey the costs of credit transactions so that consumers can make informed decisions about their payment choices.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: June 15, 2016

Respectfully submitted,

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RECORD
AND
BRIEFS

No. 15-1391

In The

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, et al.,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT SCHOLARS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

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[1] The parties received timely notice of and have consented to this brief. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than the amici and

These scholars are all dedicated to the study of the freedoms guaranteed by the First Amendment and have published articles on this subject. Based on this experience, the amici are concerned that the decision below—and others like it, as identified in the petition—imperil the protection of commercial speech under the First Amendment. The amici thus seek to help the Court understand why certiorari should be granted in light of this important concern.

SUMMARY OF THE ARGUMENT

Imagine an electronics store in New York needs to recoup $100 on the sale of a television. If the store owner labels the television with a sticker price of "$100 plus $2 for credit card sales" or "$102, which includes $2 for credit card sales," the owner risks jail time. But if the label reads "$102, with a $2 discount for cash sales," the store owner is in the clear.

Ultimately, that is what this case is about: the criminalization of truthful commercial speech. New York has enacted a law that prohibits sellers from announcing a surcharge for credit-card sales. *See* N.Y. Gen. Bus. Law § 518; *People v. Fulvio*, 517 N.Y.S.2d 1008, 1011 (N.Y. Crim. Ct. 1987). This surcharge ban does not mean, however, that sellers must charge identical prices for credit-card sales and cash sales. *See*

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their counsel, contribute money intended to fund the preparation or submission of this brief.

Cert. Pet. 10–12. Instead, New York enforces its surcharge ban by instructing sellers to inflate their normal sticker prices and then announce "discounts" from these prices for cash sales. *See id.* Sellers must then tread carefully in explaining this situation to inquiring customers in order to avoid referring to a surcharge and thus committing a crime. *See id.* The most sellers can disclose is a half-truth: that their sticker prices do not apply to those who pay with cash. *See id.* at 11–12 (identifying what New York allows sellers to say about the effect of New York's surcharge ban).

The petitioners here, several New York sellers, have challenged this state of affairs as a violation of their free speech rights under the First Amendment. *See* Cert. Pet. 13–14. The Second Circuit, however, found that New York's enforcement of its surcharge ban did not curb speech at all and instead merely regulated economic conduct in terms of how sellers may set their sticker prices. *See* App. 18a, 27a.

The amici respectfully submit that the Court should grant certiorari in this case. This Court has consistently affirmed that the First Amendment protects "the consumer's interest in the free flow of truthful commercial information"—especially when it comes to truthful information about prices. *United States v. United Foods, Inc.*, 533 U.S. 405, 426 (2001); *see 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (invalidating state ban on truthful advertising of liquor prices); *Va. State Bd. of Pharmacy v. Va. Citizens*

Consumer Council, Inc., 425 U.S. 748, 773 (1976) (invalidating state ban on truthful advertising of prescription drugs).

The decision below stands in direct conflict with this principle. Under the Second Circuit's view, so long as a law is dressed up as a regulation of economic conduct, there is no place at all for First Amendment inquiry even if the law's main purpose or effect is to restrict the free flow of truthful commercial information about prices to consumers. And that is what New York's surcharge ban achieves by presenting sellers with a Hobson's choice: either announce sticker prices that keep people in the dark about the extra costs of credit-card processing, or announce sticker prices that disaggregate these costs for the consumer at the risk of fines and jail time.

This Court should therefore grant review to clarify when laws or policies that purport to regulate economic conduct still merit scrutiny under the First Amendment and its protection of commercial speech. Such clarification is vital not only to resolve a circuit split on the kind of surcharge ban that is at issue in this case but also to preserve the First Amendment's status as a bulwark against government attempts to suppress truthful commercial information.

ARGUMENT

I. This Court should grant review to clarify when a regulation of economic conduct is really a curb on commercial speech.

Time and again, this Court has recognized that the First Amendment protects the "consumer's interest in the free flow of commercial information." *Va. State Bd. of Pharmacy*, 425 U.S. at 763. The robustness of this protection, however, hinges on the ability of lower courts to recognize state restrictions on commercial speech in whatever guise they may take, including as purported regulations of economic conduct. This case presents the Court with an ideal vehicle to address this problem—a problem that has split the circuits and that "has not been, but should be, settled by this Court." Sup. Ct. R. 10.

In this case, the Second Circuit found that New York's surcharge ban raised no First Amendment concerns whatsoever. As the panel put it, what New York's surcharge ban "regulates—all that it regulates—is the difference between a seller's sticker price and the ultimate price that it charges to credit-card customers." App. 21a–22a. For this reason, the panel found that the ban "regulate[d] conduct, not speech" and viewed the ban's purpose and effect through this perspective. App. 27a; *see, e.g.*, App. 24a (observing the government may ban prices based just on "how consumers will react to them").

The panel took a short-sighted view of the facts and the law, however, to find that the key ingredient to

criminal liability under New York's surcharge ban—a "sticker price"—was not speech. To be sure, on its face, this ban may appear to regulate conduct. Under the ban, "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. The ban might therefore seem to prohibit sellers from charging different prices to consumers based on a consumer's mode of payment.

But that is not how New York enforces this ban. New York sellers *can* use mode-of-payment to vary the ultimate price that customers pay. *See* Cert. Pet. 10–12. The ban only affects how sellers explain this price variance to consumers. *See id.* New York will penalize sellers whose sticker prices say "$100 plus a $2 surcharge for credit-card sales." *See id.* New York may also penalize sellers who state their sticker prices as "$102, which includes a $2 credit-card surcharge," or who state two sets of sticker prices—a credit-card price and a cash price—if the contextual language indicates a surcharge. *See id.* But New York will not penalize sellers who state a sticker price as "$102, with a $2 discount for customers who decide to pay by cash." *See id.*

As such, a seller's criminal liability under New York's surcharge ban turns on how a seller explains her prices. This ban does not regulate prices, nor does it combat customer confusion. What the ban does—and all that it does—is restrain sellers from making the costs of credit-card payments obvious to consumers. This brings the First Amendment into the picture. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011)

("An individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated.").

The Second Circuit's failure to appreciate this feature of New York's surcharge ban—and the necessary First Amendment consequences that follow from it—should concern the Court. This myopia reflects a troubling willingness on the part of some lower courts to uncritically accept a state's attempt to disguise its efforts to restrict commercial speech as a mere regulation of economic conduct. The Second Circuit here, for example, decried petitioners' "bewildering persistence" in claiming New York's surcharge ban violated the First Amendment (App. 21a)—a claim that the district court found not only had merit but was also conclusive. *See* App. 85a.

The Eleventh Circuit has not made this error. *See Dana's R.R. Supply v. Att'y Gen., Florida*, 807 F.3d 1235 (11th Cir. 2015). Analyzing Florida's surcharge ban—which is like New York's—the panel recognized that while this ban "purport[ed] to regulate commercial behavior," it had "the sole effect of banning merchants from uttering the word *surcharge*, criminalizing speech that is neither false nor misleading." *Id.* at 1251.

The Eleventh Circuit also used a simple analogy to illustrate this point: imagine a law that prohibits restauranteurs from serving "*half-empty* beverages" while expressly allowing restauranteurs "to serve

half-full beverages." *Id.* at 1245. Any claim that the law regulates conduct (i.e., how beverages are to be served) would be specious. Liability under this law "turns solely on the restauranteurs' choice of words." *Id.* If a restauranteur serves a half-glass of wine to a diner and the diner asks for a description of how much wine is in the glass, the restauranteur risks jail time only if he says that the glass is "half-empty." *See id.*

The Eleventh Circuit's analysis follows this Court's view that while a law "may be described as directed at conduct," the First Amendment still applies when "the conduct triggering coverage under the statute consists of communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). The Eleventh Circuit's analysis also comports with basic common sense, for courts cannot hope to "do justice to the concerns of free speech" unless they "delve beyond superficial form, disregard[ing] mechanical formulas and preconceived prejudices that have existed in this area."[2]

The decision below thus warrants review by this Court to help lower courts identify when regulations that superficially concern economic conduct are, in fact, restrictions on commercial speech that merit First Amendment review. Absent this Court's intervention, the Second Circuit's ruling stands to reduce the

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[2] Martin Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 473 (1971).

commercial speech doctrine to "a form of words." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). Put another way, under the decision below, the government may successfully use concepts like "sticker price" to disguise what is unquestionably a restriction upon truthful communication.

Little imagination is necessary to conceive of the myriad ways in which this rule may be abused to the detriment of free speech—and not just commercial speech. Consider a town council that decides to impose a "soda tax" to combat public obesity but also seeks to stifle criticism of this policy from grocers, soda manufacturers, and members of the public. The council therefore passes a law requiring all grocers to incorporate this tax into sticker prices for soda. As a result, under this law, the first sales invoice below is unlawful while the second sales invoice is lawful:

Unlawful Sales Invoice

12-oz soda	$1.00
Soda tax	$2.00
Total	$3.00

Lawful Sales Invoice

12-oz soda	$3.00
Total	$3.00

Both invoices put customers on notice about the total amount they will pay. The difference is in how the underlying prices are expressed, how they are framed, and how they are likely to be perceived. There also can

be no question that any effort by the government to stifle expression about taxation would implicate the First Amendment's core protection of political speech. Yet, under the Second Circuit's logic here, any grocer who objects to the town council's new law has no First Amendment claim because all the law appears to do is regulate the conduct of tax collection.

This is not a theoretical problem, as the state of Kentucky has proven. Kentucky tried to ban telecom providers from listing a new telecom tax on customer bills. *See BellSouth Telecomm., Inc. v. Farris*, 542 F.3d 499, 500–01 (6th Cir. 2008). The Sixth Circuit correctly found, in turn, that the First Amendment applied to this ban as Kentucky had "no objection to the [telecom] providers' conduct (raising prices to account for the new tax), just [the providers'] speech (saying why [they] ha[ve] raised prices)." *Id.* at 506.

The Court should therefore take this case in order to provide lower courts the clarity they need to recognize the obvious—that laws like New York's surcharge ban regulate protected commercial speech, not conduct. This does not mean, however, that the First Amendment invalidates these laws. These laws may still survive First Amendment review if they are in fact tailored to an important government purpose. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

The bottom line, however, is that in cases like this one, the First Amendment applies. That is why this

case is so important. When the state decides to "impos[e] criminal liability for . . . the 'wrong choice' between equally plausible alternative descriptions of an objective reality," courts must hold the state to the "robust protections of the First Amendment." *Dana's R.R. Supply*, 807 F.3d at 1246.

II. This Court should grant review to prevent government suppression of truthful speech that consumers deserve to hear.

This Court has determined that commercial speech is protected under the First Amendment not only because society has a strong interest in "the free flow of commercial information" but also because consumers are entitled to the truth when it comes to commercial transactions. Government officials thus cannot "completely suppress the dissemination of concededly truthful [commercial] information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Va. State Bd. of Pharmacy*, 425 U.S. at 773.

New York's enforcement of its surcharge ban transgresses this principle in a remarkable manner that warrants this Court's attention. New York does more than prevent sellers from educating consumers about the real costs of paying by credit card. New York also tells sellers to hide these costs from consumers by manipulating sticker prices and then offering "discounts" to cash users. *See* Cert. Pet. 10–12. And New York does this not to protect consumers' interests but

rather to protect the credit-card industry. *See* Cert. Pet. 6–10.

New York's surcharge ban thus strikes at the heart of this Court's First Amendment jurisprudence. This jurisprudence prioritizes the protection of those who seek to speak the truth. For this reason, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979). And truth is even more central to the protection of commercial speech under the First Amendment, for "[i]t is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed." *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

Hence, where this Court has upheld restraints on commercial speech, the Court has done so because the restrictions at issue advanced truth in advertising. As this Court has noted, "[p]ermissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques." *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 574. In this vein, these permissible restraints have required commercial messages to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent [their] being deceptive." *Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24.

New York's enforcement of its surcharge ban, however, prohibits sellers from using their sticker prices to give information, warnings, or disclaimers about the

true costs of paying by credit card. *See* Cert. Pet. 10–12. Sellers must instead adopt a veritable "party line" recommended by New York officials that turns surcharges on credit-card payments into "discounts" for cash payments. *See id.* New York believes this language will "protect[] consumers against irrational psychological annoyances." App. 23a.

The First Amendment, however, "directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart*, 517 U.S. at 503 (plurality op. joined by Stevens, Kennedy, and Ginsburg, JJ.). For good reason. When the "government prevents willing speakers from speaking the truth to audiences in order to manipulate their decision-making, it engages in an especially offensive form of paternalism."[3]

Such paternalism is a problem with respect to state restrictions on commercial speech because this speech "contribute[s] directly to human autonomy."[4] Individuals make "meaningful and expressive choices through commerce."[5] A person can "buy fair trade coffee, drive a hybrid car, and avoid fast food chains that

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[3] Steven Shiffrin, *The First Amendment & Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1259 (1983).

[4] Jane Bambauer & Derek Bambauer, *Information Libertarianism*, 105 CAL. L. REV. (forthcoming 2017) (manuscript at 46), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741139.

[5] *Id.* (manuscript at 46).

oppose gay marriage."[6] Consequently, in modern America, a person's interest in commercial speech is often "as keen, if not keener by far, than his interest in the day's most urgent political debate." *Va. State Bd. of Pharmacy*, 425 U.S. at 763.

New York's surcharge ban thus raises far more First Amendment concerns than the Second Circuit recognized. New York may of course directly ban all forms of price differentiation between customers who pay with credit-cards and those who pay with cash. This direct regulation would raise no First Amendment problems, and it would more obviously and transparently reveal the legislature's end goal—to subsidize the credit-card industry."[7]

What New York cannot do is try "to accomplish the same purpose" of a real surcharge ban "through a policy of consumer ignorance, at the expense of the free-speech rights of . . . sellers and purchasers." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 498 (1995) (Stevens, J., concurring). And that is what is at issue here. New York's surcharge ban, as applied, removes sticker prices from the vocabulary of true commercial speech that allows both sellers and consumers to form "intelligent opinions as to how [our nation's free enterprise] system ought to be regulated or altered." *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

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[6] *Id.* (manuscript at 46).

[7] *See id.* (manuscript at 31).

Yet, this is the point of New York's surcharge ban given that it is the brainchild of the credit-card industry rather than an objective legislative effort to protect consumers. *See* Cert. Pet. 6–10. The ban shields the credit-card industry from criticism by keeping credit-card users in the dark about swipe fees and causing cash users "to subsidize the retail purchases of credit-card users." App. 59a. The ban thus embodies the "capture of governmental power by a self-serving faction of commercial actors seeking to entrench its own economic interests."[8] Those interests, however, should not be allowed to trump the First Amendment, whose very purpose is "to preserve an *uninhibited* marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (emphasis added).

CONCLUSION

The Court should grant certiorari in this case to provide much-needed guidance to lower courts about when the First Amendment applies to purported regulations of economic conduct. The Second Circuit failed to recognize that the First Amendment applied here because the panel was unwilling to look past the conduct-based veneer of New York's surcharge ban. But this veneer does not change the ban's purpose and effect, which is to prevent sellers from using their sticker

[8] Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 241 (1992).

prices to communicate the true price of credit-card transactions to consumers. Nor can this veneer subvert the meaning of the First Amendment, which properly applies whenever the government "seeks to prevent the truth from being disseminated."[9] The Court should use this case to make that clear.

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[9] Shiffrin, *supra* note 3, at 1256–57.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE MARION B. BRECHNER FIRST AMENDMENT PROJECT IN SUPPORT OF PETITIONERS

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Spargo v. New York State Comm'n on Judicial Conduct, 351 F.3d 65 (2d Cir. 2003) 2

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Winters v. New York,
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Cal. Civ. Code § 1748.1(a) (2016) 5

Fla. Stat. § 501.0117 (2016) 5

N.Y. Gen. Bus. Law § 518 (2016) 2, 8

Tex. Fin. Code § 339.001 (2016) 5

OTHER AUTHORITIES

Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. Colo. L. Rev. 649 (2006) 8

Marc J. Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. Rev. 799 (2006) 5

Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 Hofstra L. Rev. 1095 (2007) 3

Adam Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265 (2006) 9

Alison M. Newman, *Note: Doing the Public a Disservice: Behavioral Economics and Maintaining the Status Quo*, 64 Duke L.J. 1173 (2015) 4

Robert C. Post, *Viewpoint Discrimination And Commercial Speech*, 41 Loy. L.A. L. Rev. 169 (2007) 7

Jonathan Slowik, *Comment: Credit CARD Act II: Expanding Credit Card Reform by Targeting Behavioral Biases*, 59 UCLA L. Rev. 1292 (2012) 4

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Marion B. Brechner First Amendment Project is a nonprofit, nonpartisan organization located in the College of Journalism and Communications at the University of Florida in Gainesville. Directed by professor and attorney Clay Calvert, the Project is dedicated to contemporary issues of free expression, including current cases and controversies affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition, and freedom of thought. This case presents issues affecting freedom of speech – namely, both the First Amendment right of merchants to speak and the First Amendment right of consumers to receive speech.

The Project's arguments thus may assist the Court in deciding this matter. As an organization dedicated to research into First Amendment rights, and advocacy in support of such rights – though one with no direct stake in the outcome of this case – the Project is well-positioned to offer this Court information about issues affecting the First Amendment speech rights of both merchants and consumers.

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[1] Pursuant to Rule of Court 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Counsel of record received timely notice of the intent to file this brief under this Rule, and the parties have provided written consent for the filing of this brief.

SUMMARY OF ARGUMENT

Retail transactions involve merchants and consumers. Conversations involve speakers and listeners. This case melds both kinds of relationships, involving merchants as otherwise willing speakers and consumers as otherwise willing listeners. Unfortunately, here the merchants are not allowed to speak as they wish and the consumers, in turn, are prohibited from receiving important information from merchants.

Amicus curiae argues that New York General Business Law § 518 interferes with the First Amendment speech rights of two groups of stakeholders in the Empire State – merchants and consumers – not merely one. Specifically, the statute detrimentally affects not only the right of merchants to freely communicate truthful pricing information regarding surcharges to their consumers, but it also hinders the reciprocal and derivative First Amendment right of consumers to receive truthful information that may directly influence their personal decision making and spending choices regarding how to pay for products and use finite fiscal resources.

There is a rich and lengthy tradition of protecting the right to receive speech in First Amendment jurisprudence, both at the level of this Court and that of the federal appellate circuit from which this cases arises. See *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (observing that the First Amendment "necessarily protects the right to receive" literature); *Spargo v. New York State Comm'n on Judicial Conduct*, 351 F.3d 65, 83 (2d Cir. 2003) ("it is well-established that the First Amendment protects not only

the right to engage in protected speech, but also the right to receive such speech"). Indeed, "courts have recognized in a variety of contexts that a right to free speech is not held just by speakers. Listeners, too, have a First Amendment right to receive speech." Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 Hofstra L. Rev. 1095, 1100 (2007).

Of particular importance for this case, one such context where the First Amendment right to receive speech is paramount is the realm of commercial speech. As this Court wrote four decades ago, "[a]s to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Va. State Bd. Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).

Amicus thus concentrates on the First Amendment right of consumers to receive speech in *Expressions Hair Design* and, specifically, to hear a higher price imposed for a credit-card purchase as involving a surcharge. *Amicus* asserts that New York's no-surcharge law inhibits the free flow of accurate pricing information to consumers and, in doing so, keeps them ignorant about the reality of swipe fees and surcharges and, ultimately, the actual cost of credit.

Such fiscal ignorance may be anything but bliss for consumers when New York merchants choose to charge two prices for the same product (a higher one for credit card purchases and a lower one for cash purchases). That's because research indicates that, due to cognitive perceptual biases, consumers respond quite differently

to the labels "surcharge" and "discount." See Jonathan Slowik, *Comment: Credit CARD Act II: Expanding Credit Card Reform by Targeting Behavioral Biases*, 59 UCLA L. Rev. 1292, 1328 (2012) ("consumers react much less intensely to discounts than they do to surcharges"). The way consumers respond to truthful pricing information depends, in brief, on how it is framed, including which price is framed as the baseline or anchor point for the "regular" price and whether a change or deviation from it is framed as an addition or subtraction. See Alison M. Newman, *Note: Doing the Public a Disservice: Behavioral Economics and Maintaining the Status Quo*, 64 Duke L.J. 1173, 1190 (2015) ("A cash discount does not feel like a loss to credit-card users; it is instead perceived as a forgone gain. If, however, the payment were framed as a charge for using a card, the consumer would view it as a loss because he would be paying more than the baseline cost paid by cash consumers").

This raises the critical question of whether consumers have a reciprocal First Amendment right to receive truthful information as framed and intended by merchant-speakers, without the government of New York placing a thumb on the scale of free expression that permits framing price information only in the manner it paternalistically deems acceptable. *Amicus* contends that consumers possess an unenumerated First Amendment right to receive truthful speech from those with whom they choose do business that describes the cost of credit as a credit-card surcharge.

Amicus thus respectfully requests that this Court grant the petition for writ of certiorari to decide whether no-surcharge laws like that in New York, as

well as similar ones in other populous states, including but not limited to California (Cal. Civ. Code § 1748.1(a)), Florida (Fla. Stat. § 501.0117 (2016)), and Texas (Tex. Fin. Code § 339.001 (2016)), violate the First Amendment right of consumers to receive truthful information that affects their personal, fiscal decision making.

ARGUMENT

I. The Right to Receive Speech is a Fundamental Corollary of the Right to Speak

Professor Marc Blitz explains that a listener's right to receive information "is simply the mirror image of the speaker's right to express it. And the First Amendment cannot protect one without meaningfully protecting the other." Marc J. Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. Rev. 799, 809 (2006). Indeed, without both a listener and a speaker, the free speech guarantee is, in the words of First Amendment scholar and current Delaware Law School Dean Rodney Smolla, "as empty as the sound of one hand clapping." Rodney A. Smolla, *Free Speech in an Open Society*, 198 (1992).

The First Amendment right to receive speech, however, is not merely the conjecture of academics and scholars. In fact, it is well established in this Court's jurisprudence.

More than fifty years ago, this Court wrote that "[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive . . ." *Griswold v.*

Connecticut, 381 U.S. 479, 482 (1965). It struck down the statute in *Griswold*, which harmed the free flow of "information, instruction, and medical advice to married persons as to the means of preventing conception." *Ibid.* at 480.

Four years later, this Court concluded, in holding unconstitutional a state statute that banned the possession of obscenity, that "[i]t is now well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). It added then that "[t]his right to receive information and ideas, regardless of their social worth, see *Winters v. New York*, 333 U.S. 507, 510 (1948), is fundamental to our free society." *Ibid.*

In 1976, this Court reiterated the importance of the right to receive speech, noting that when there is a willing speaker, the First Amendment "protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). Critically, the Virginia statute banned the ability of licensed pharmacists to convey to consumers, via direct or indirect advertising, truthful and factual price information about prescription drugs. *Ibid.* at 750, n.2. The law was challenged by "prescription drug consumers." *Ibid.* at 753. They argued "that the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs." *Ibid.* at 754.

The Court determined that, "[a]s to the particular consumer's interest in the free flow of commercial

information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Ibid.* at 763. The Court therefore struck down the Virginia statute so that consumers could make better informed choices when purchasing drugs, remarking that "[s]o long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed." *Ibid.* at 765.

The *Virginia State Board of Pharmacy* decision laid the foundation for a commercial speech doctrine under which, as current Yale Law School Dean Robert Post describes it, "[c]ommercial speech is protected so that citizens can receive information." Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 Loy. L.A. L. Rev. 169, 177 (2007). Indeed, the consumer's interest in the free flow of information has been this Court's "longstanding focus, in the commercial speech area." *American Meat Inst. v. U.S. Dep't Agriculture*, 760 F.3d 18, 29 (D.C. Cir. 2014). As the Supreme Judicial Court of Massachusetts recently wrote, the "interests of consumers in receiving commercial information, and the interests of society in the free flow of such information, have been the foundation of commercial speech doctrine from its inception." *Bulldog Investors Gen. P'ship v. Sec'y of Commonwealth*, 953 N.E.2d 691, 716 (Mass. 2011).

This Court has observed, in turn, that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996).

II. New York General Business Law § 518 Violates, in Paternalistic Fashion, the First Amendment Right of Consumers to Receive Truthful Information that Affects Their Purchasing Decisions

Unfortunately, by permitting the framing of price information in only the manner the government of New York deems fit, consumers are kept in the dark about the cost of credit. This is particularly troubling because research suggests that when consumers are made aware of surcharges imposed when paying with credit cards, they tend to avoid paying with credit cards. That is because a surcharge is perceived as a loss of money.

One article, for example, points out that "when considering the relative costs of two forms of payment, consumers readily accept a 'discount for cash' but are offended by a 'surcharge for credit card use.' The critical difference is selecting either the higher or lower price as the anchor for evaluation, particularly since consumers value avoiding losses more than potential gains. Thus, commercial entities can influence our behavior as consumers by framing how we perceive their actions." Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. Colo. L. Rev. 649, 684 (2006). Another article asserts that credit card companies prefer use of the term "discount" and would rather bury the word "surcharge" because "consumers perceive a discount as a gain, but a surcharge as a penalty and will prefer to use another payment system

rather than be penalized for using credit." Adam Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 281 (2006).

In a nutshell, prohibiting the free flow of information to consumers about surcharges imposed on credit card purchases keeps consumers in the dark about the hidden costs of credit. No-surcharge laws thus manipulate consumers' cognitive biases by concealing information from them. The Second Circuit, however, gave this short shrift, writing that "[t]he First Amendment poses no obstacle" to a no-surcharge law "spurring demand for credit-card use." *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 133 (2d Cir. 2015).

The bottom line here is, indeed, the financial bottom line: consumers have a First Amendment right to receive truthful information as disclosed and framed in a manner that merchants see fit – not only in the manner the government deems acceptable – in order to make better informed decisions about how they spend their money. New York's no-surcharge law paternalistically keeps them in the dark to the benefit of credit card companies. The First Amendment right of consumers to receive truthful commercial speech must not be lost or forgotten in *Expressions Hair Design*. This case thus provides the Court with a prime opportunity to return the commercial speech doctrine to its original foundation: to facilitate "the free flow of commercial information" among citizens, thereby "enlighten[ing] public decisionmaking in a democracy." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764–65 (1976).

CONCLUSION

For the reasons set forth above, *Amicus* respectfully requests that this Court grant Petitioners' Petition for a Writ of Certiorari and decide whether no-surcharge laws like that in New York and similar ones in other populous states, including but not limited to Florida, California and Texas, not only violate the First Amendment speech rights of merchants, but also violate the First Amendment rights of consumers to receive truthful information that affects their personal, fiscal decision making.

Respectfully submitted,

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RECORD AND BRIEFS

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Petitioners,

v.

ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF SCHOLARS OF BEHAVIORAL ECONOMICS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Andrew Ching & Fumiko Hayashi, *Payment Card Rewards Programs and Consumer Payment Choice* (Fed. Reserve Bank of Kansas City, Working Paper No. 06-02, 2006), *available at* http://www.kansascityfed.org/PUBLICAT/PSR/RWP/Ching_Hayashi_Paper.pdf 13

Daniel Kahneman, *Thinking, Fast and Slow* (2011) 5, 7, 10, 11, 12

Dan Ariely, *Predictably Irrational* (2008) 5

Cleotilde Gonzalez, et al., *The Framing Effect and Risky Decisions: Examining Cognitive Functions with fMRI*, Economic Psychology, Nov. 5, 2003 . . . . . 9, 10

Elizabeth Kolbert, *What Was I Thinking?* The New Yorker, Feb. 25, 2008, *available at* http://www.newyorker.com/magazine/2008/02/25/what-was-i-thinking 4

Adam J. Levitin, *Payment Wars: The Merchant-Bank Struggle for Control of Payment Systems*, 12 Stan. J.L. Bus. & Fin. 425 (2007) 13

Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321 13

Alain Samson, *The Behavioral Economics Guide 2015*, *available at* https://www.behavioral economics.com/the-behavioral-economics-guide-2015/ 4, 5

Esther-Mirjam Sent, *Behavioral Economics: How Psychology Made Its (Limited) Way Back Into Economics*, 36 History of Political Economy 735 (2004) 4

Scott Schuh, et al., *An Economic Analysis of the 2010 Proposed Settlement Between the Department of Justice and Credit Card Networks*, Public Policy Discussion Papers, Federal Reserve Bank of Boston, No. 11-4, *available at* http://www.bostonfed.org/economic /ppdp/2011/ppdp1104.pdf 12

Richard H. Thaler, *Misbehaving: The Making of Behavioral Economics* (2015) 4, 5

Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008) 5, 11

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INTEREST OF *AMICI*[1]

Amici are seven professors in the fields of economics, psychology, and law who engage in significant research and teaching on behavioral economics and its application to consumer economic behavior. See Appendix (listing individual professors joining this brief). This brief addresses issues that are within *amici's* particular areas of scholarly expertise.

Behavioral economics applies psychological insights into human behavior to explain economic decision-making. Behavioral economics has shown that consumer behavior in many situations systematically departs from that predicted by traditional economic theory, which assumes more purely rational, mathematical decision making and often fails to fully explain the real-world experience of the marketplace.

Amici believe that this case—which concerns the significance of the framing effect under the First Amendment—presents the first petition for certiorari based squarely on behavioral economic theory. As relevant here, behavioral economics reveals that

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. *Amici* advised counsel for Petitioners of their intent to file this brief around April 28, 2016, and counsel gave consent to the filing at that time. *Amici* provided counsel for Respondent Eric. T. Schneiderman with notice of their intent to file on June 2, 2016, and counsel consented on June 6, 2016. *Amici* belatedly learned that Respondents Cyrus R. Vance and Kenneth P. Thompson were separately represented on June 10, 2016, and immediately advised counsel of *amici's* intent to file this brief. Counsel for Mr. Vance and Mr. Thompson consented to the filing the same day.

consumers' purchasing decisions are influenced significantly by the way in which information—including price information—is framed. The state no-surcharge laws at issue in this case limit the manner in which merchants frame the costs of using credit cards as a payment device, rather than cash or debit cards. *Amici* possess expertise on how such framing affects consumer behavior.

SUMMARY OF ARGUMENT

Merchants pay fees ("swipe fees") on every credit card transaction, and predictably, they pass the cost of these fees on to their customers. Under the "no-surcharge" laws of New York and several other states, however, merchants are permitted to charge different prices to cash and credit customers, but are restricted in the way they describe the mathematical relationship between the two prices. They can provide "discounts" for cash purchases, but are criminally prohibited from setting "surcharges" on credit card transactions. Thus, a merchant could advertise a regular price of $100 and offer a $2 cash discount, but could not advertise a regular price of $98 with a $2 surcharge for credit.

Under traditional economic theory, the market impact of a "cash discount" should be the same as the impact of a "surcharge." Credit card customers pay more, and cash customers pay less, regardless of the label attached. We would thus expect the promise of a cash discount to induce consumers to forego paying with their credit cards to the same extent penalizing them with a surcharge would do so. After all, surcharges and cash discounts are just two ways of conveying identical information about the relationship between two prices.

But pioneering work in the field of behavioral economics teaches that people do not make decisions based strictly on rational calculations. Instead, their decisions can be highly influenced by the manner in which information is presented: a perceived reward garners a minor, positive reaction, while a perceived penalty produces a strong, negative reaction. In this way, framing is a material part of any communication.

In the context of credit card surcharging, behavioral economics has shown that consumers react very differently to discounts and surcharges. A discount is perceived as a "reward" for a cash purchase, generating a mild, positive reaction. A surcharge is perceived as a "penalty" for a credit purchase, garnering a much stronger, negative reaction. In this way, a merchant's ability to incentivize use of a preferred payment method is diminished by the limits no-surcharge laws place on the way the merchants describe the price differential.

ARGUMENT

I. Behavioral economics explores the effect of psychological, sociological, and related factors on real-world economic decisions.

Behavioral economics is a relatively new field—about 35 years old—that stands at the intersection of traditional economics and psychology. *See e.g.*, Esther-Mirjam Sent, *Behavioral Economics: How Psychology Made Its (Limited) Way Back Into Economics*, 36 History of Political Economy 735 (2004) [hereinafter *Behavioral Economics*]; Elizabeth Kolbert, *What Was I Thinking?* The New Yorker, Feb. 25, 2008, *available at* http://www.newyorker.com/magazine/2008/02/25/what-was-i-thinking; Alain Samson, *The Behavioral Economics Guide 2015*, at 1-2 [hereinafter *The Behavioral Economics Guide*], *available at* https://www.behavioraleconomics.com/the-behavioral-economics-guide-2015/.

Traditional economics treats human beings as relentlessly rational actors who consistently work to maximize their self-interest. Richard H. Thaler, *Misbehaving: The Making of Behavioral Economics*, at 4-5 (2015) [hereinafter *Misbehaving*]. Behavioral economists challenge that view by exploring and elucidating the ways in which our decision making is clouded or distorted by our limited cognitive abilities and willpower, our unconscious biases, and the unacknowledged mental shortcuts we use all the time when problem-solving. *Id.* at 5-6; *Behavioral Economics*, *supra*, at 747-50.

One of the field's pioneers, University of Chicago professor Richard Thaler, has described behavioral

economics as an "enriched version of economic theory," by which he means "economics done with strong injections of good psychology and other social sciences." *Misbehaving*, *supra*, at 9. In the last few decades, the field has enjoyed growing prominence in university economics' departments and in policymaking circles. *Id.*; *The Behavioral Economics Guide*, *supra*, at 2. Some of its key observations and findings have been presented to the lay public in such popular recent works as Daniel Kahneman, *Thinking, Fast and Slow* (2011) [hereinafter *Thinking, Fast and Slow*] and Dan Ariely, *Predictably Irrational* (2008). In 2008, Thaler and law professor Cass Sunstein co-authored *Nudge*, in which they showed how policymakers could draw on the insights of behavioral economics to improve public policies. Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008) [hereinafter *Nudge*].

Much of the work of behavioral economists is done through field studies and the literature is rife with interesting examples, some of which will be described below. Although not a formal study, one example from Richard Thaler helps to show what makes behavioral economics different.

Early in his scholarly career, Thaler incurred the displeasure of his students when he gave an exam in which the average score turned out to be 72 points out of a possible 100. *Misbehaving*, *supra*, at 3. As Thaler explained, his students' anger was odd because he had already told them that "the average numerical score on the exam had absolutely no effect on the distribution of grades." *Id.* Any exam that scored over an 80 would receive an "A," those over 65 would get a "B," and those

over 50 would get a "C." According to Thaler, his students were still not happy. *Id.*

On the next exam, Thaler made the total number of points available 137, instead of 100. *Id.* The average score was 96 points and some students scored above 100. According to Thaler, his students "were delighted," and the over-100 scores produced "a reaction approaching ecstasy." *Id.* at 4. Under traditional economic theory, a score of 96 out of 137 should be met with the same reaction as a score of 72 out of 100—they are mathematically equivalent. *Id.* That was not their response, however. Although Thaler does not make it explicit, no doubt the students' traditional associations with scores of 90 and above representing "A"-level work had influenced their reactions.

Behavioral economics explores these very human—and typically unseen—cognitive and emotional predispositions, which so heavily influence the decisions we make. Amongst other benefits, that exploration allows the public to understand better the practical effects of laws and policies.

II. The way in which options are framed materially affects consumer choices.

Behavioral economists have discovered a cognitive bias—a systematic way in which people misprocess information—which they call the "framing effect." The framing effect reflects the fact that people will reach different decisions depending on the way information is presented, despite the fact that the information presented is not substantively altered by its presentation. *See* Amos Tversky & Daniel Kahneman,

The Framing of Decisions and the Psychology of Choice, Science, Jan. 30, 1981, at 453-58.

For example, in one early experiment doctors at Harvard Medical School were given information about the short-term outcomes of selecting surgery to treat lung cancer. *Thinking, Fast and Slow*, *supra*, at 366-67. Half the doctors were told that the one-month survival rate following surgery was 90 percent. *Id.* at 367. The other half was told that the one-month mortality rate was 10 percent. *Id.* In other words, all the doctors were effectively given the same information, if analyzed rationally. The way in which that information was presented—whether as a one-month survival rate or a one-month mortality rate—should not have influenced their decisions as to whether surgery was the best course of treatment.

But that is not what happened. Instead, when the surgery outcomes were framed in terms of *survival* rates, 84 percent of the doctors selected surgery; but when the outcomes were framed in terms of *mortality* rates, just 50 percent chose surgery. *Thinking, Fast and Slow*, *supra*, at 367. The frame through which the information was presented mattered because emotions, not just rational considerations, play a powerful role in human decisionmaking. As Daniel Kahneman puts it, "mortality is bad, survival is good, and 90% survival sounds encouraging whereas 10% mortality is frightening." *Id.*

In another classic example, Kahneman and Tversky again showed that framing exerts enormous influence over the decisions that people reach. In the "Asian disease" problem, Kahneman and Tversky asked a group of subjects to choose between two competing

plans to address a disease expected to kill 600 people. *See* Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. No. 4, Part 2 S251-78 (1986) [hereinafter *Rational Choice*]. In the first experiment, they framed the outcomes of the alternative plans in terms of the number of people who would be "saved," and in the second experiment they framed the outcomes in terms of the number of people who would "die." *Id.* at S260.

Although the identical information was conveyed in both frames, the study participants overwhelmingly chose one plan when the outcomes were characterized in terms of lives "saved," and overwhelmingly chose the *other* plan when the outcomes were characterized in terms of deaths. *Rational Choice*, *supra*, at S260. The hypothetical the participants were asked to consider was as follows:

> Imagine that the U.S. is preparing for the outbreak of an unusual Asian disease, which is expected to kill 600 people. Two alternative programs to combat the disease have been proposed. Assume that the exact scientific estimates of the consequences of the programs are as follows:
>
> If Program A is adopted, 200 people will be saved.
>
> If Program B is adopted, there is a 1/3 probability that 600 people will be saved, and 2/3 probability that no people will be saved.

Id. In this formulation of the problem, 73 percent of the participants chose Program A and just 28 percent chose Program B. *Id.* In other words, the respondents were

risk-averse, and the guarantee of saving 200 lives was far more attractive than the gamble entailed in Program B. *Id.*

But when the competing programs were described in terms of the number of people who would *die*, the respondents selected the gamble, rather than the guarantee. In this second experiment, the participants were given the same hypothetical, but were presented with the following program choices:

> If Program C is adopted, 400 people will die.
>
> If Program D is adopted, there is 1/3 probability that nobody will die and 2/3 probability that 600 people will die.

Rational Choice, at S260. Faced with these scenarios, just 22 percent of respondents selected Program C, and 78 percent selected Program D. *Id.* That is not what we would expect from rational decisionmaking. Programs A and C convey the identical information (200 people will be saved and 400 people will die), as do Programs B and D. So, a rational decisionmaker should select A and C with the same frequency and B and D with the same frequency. But the results show that the percentages are inverted depending on the frame used to present the problem. The emotional trigger words—people who would be "saved" versus those who would "die"—made all the difference in how the participants evaluated the alternative programs.[2]

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[2] Research has shown that, "People appear to exhibit a general tendency to be risk seeking when confronted with negatively framed problems and risk averse when presented with positively framed problems." Cleotilde Gonzalez, et al., *The Framing Effect*

Indeed, even public health officials, people we might expect to know better, have proven vulnerable to the framing effects of the Asian disease problem. *Thinking, Fast and Slow*, *supra*, at 368.

Another study reflects that use of costly bank overdraft services is *reduced* when customers are offered a discount on overdraft fees as compared with customers who were merely reminded that overdraft services were available for a fee. Sule Alan, Mehmet Cemalcilar, Dean Karlan, & Jonathan Zinman, *Unshrowding Effects on Demand for a Costly Add-on: Evidence from Bank Overdrafts in Turkey* (March 2016), *available at* http://www.dartmouth.edu/~jzinman/Papers/overdraft_turkey_March2016.pdf. In the abstract, one would expect a discount offer to *increase* use. The counter-intuitive result of the study, however, appears to have been caused in part by the fact that mentioning a discount more strongly reminded customers of the fees they pay for overdraft services. *Id.* at 21-24.

Framing is so consequential because people are lazy and naturally inclined to accept problems as they are framed, rather than investigate further to understand how perceptions affect the choices they make. *Thinking, Fast and Slow*, *supra*, at 367. As Kahneman explains, "most of us passively accept the decision problems as they are framed and therefore rarely have an opportunity to discover the extent to which our preferences are *frame-bound*, rather than *reality-bound*." *Id.*

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and Risky Decisions: Examining Cognitive Functions with fMRI, Economic Psychology, Nov. 5, 2003, at 2.

The framing effect and the cognitive biases it exploits are not merely interesting trivia. Rather, the public policy implications of different frames can be profound. For example, the "miles per gallon" formulation for vehicle fuel efficiency is misleading compared to a "gallons per mile" frame. *Thinking, Fast and Slow*, *supra*, at 371-72. Consistently, as discussed in the next section, framing effects also have a material impact on consumers in the context of credit surcharging and discounts. Thus, framing is a significant part of the content of any communication, especially when used consciously.

III. Surcharge restrictions selectively limit the framing of credit costs with measurable impacts.

As relevant here, the framing effect is influenced by a cognitive bias known as "loss aversion." Simply put, losses provoke more extreme responses than gains do. As Cass Sunstein and Richard Thaler put it, "[r]oughly speaking, losing something makes you twice as miserable as gaining the same thing makes you happy." Richard R. Thaler & Cass R. Sunstein, *Nudge*, *supra*, 33; *Rational Choice*, *supra*, at S258. Thus, the negative feeling of loss triggered by having to pay a surcharge is more pronounced than any positive feeling that might be generated through gaining a discount.

The forgoing psychological effects have a material impact on consumer behavior when the law prohibits framing a price difference as a credit-card "surcharge" rather than as a cash "discount." When consumers are offered a small discount for paying in cash, they are often willing to ignore it for the sake of convenience, treating the discount as a lost opportunity cost. When

consumers are asked to pay a premium on top of the perceived base price, however, they perceive it as an out-of-pocket cost. Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behav. & Org. 39, 45 (1980). As a result, "people will more readily forgo a discount than pay a surcharge. The two may be economically equivalent, but they are not emotionally equivalent." *Thinking, Fast and Slow*, *supra*, at 364. Thus, surcharging provides merchants with a much stronger tool for incentivizing the use of less-expensive payment methods.

This is not merely theoretical. A Dutch study showed that consumers have a very negative reaction to surcharges (74 percent of respondents deemed them "bad" or "very bad"), but not an especially positive reaction to cash discounts (only 22 percent viewed them as "good" or "very good"). E. Vis & J. Toth, *The Abolition of the No-Discrimination Rule, Report For European Commission Directorate General Competition* 12 (2000), *available at* http://www.creditslips.org/files/netherlands-no-discrimination-rule-study.pdf. Consistently, an internal study conducted by IKEA confirmed what the Dutch study suggests: surcharging leads to decreased use of credit cards. Scott Schuh, et al., *An Economic Analysis of the 2010 Proposed Settlement Between the Department of Justice and Credit Card Networks*, Public Policy Discussion Papers, Federal Reserve Bank of Boston, No. 11-4, 26-27 *available at* http://www.bostonfed.org/economic/ppdp/2011/ppdp1104.pdf. "This may be why banks and credit card networks are opposed to surcharges." *See id.*

In turn, the ability to incentivize the use of cash and other inexpensive payment methods is significant.

Merchants have clear incentives to accept credit cards, including increased profitability and operational efficiency. *See* Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1342, 1353; Adam J. Levitin, *Payment Wars: The Merchant-Bank Struggle for Control of Payment Systems*, 12 Stan. J.L. Bus. & Fin. 425, 483 (2007). But merchants gain little or no additional benefit from accepting rewards cards. Swipe fees are substantially higher on rewards cards, but they do not generate an increase in consumer spending or operational efficiencies for merchants. *See* Andrew Ching & Fumiko Hayashi, *Payment Card Rewards Programs and Consumer Payment Choice* 4 (Fed. Reserve Bank of Kansas City, Working Paper No. 06-02, 2006), *available at* http://www.kansascityfed.org/PUBLICAT/PSR/RWP/Ching_Hayashi_Paper.pdf.

Thus, in a free market, merchants would often accept credit cards, but charge more for premium rewards and other high-fee cards. Through these pricing signals, consumers would either be discouraged from using high-cost cards or would pay for the benefits they receive. No-surcharge laws, however, make it impossible for merchants to charge consumers based on the cost of the consumer's choice of card, as the surcharge for a rewards card would be a surcharge above the cost of a cash transaction. Likewise, a cash discount is ineffective at incentivizing use of lower cost cards because a cash discount necessarily treats all non-cash transactions the same way.

CONCLUSION

A "surcharge" and a "cash discount" communicate an economically identical reality, but consumer perceptions are materially altered by the way in which this reality is framed for them by merchants. Thus, no-surcharge laws burden merchants' ability to communicate information in a way that many are likely to prefer because it more effectively incentivizes consumer choices.

Respectfully submitted,

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APPENDIX

APPENDIX

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Supreme Court, U.S.
FILED
NOV 14 2016
OFFICE OF THE CLERK

No. 15-1391

In the Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *et al.*,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed May 12, 2016
Certiorari Granted September 29, 2016

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Order of the United States District Court for the Southern District of New York on Motion for Preliminary Injunction (October 3, 2013) ..... App. 55a

U.S. District Court for the
Southern District of New York (Foley Square)
Civil Docket for Case No. 1:13-cv-03775-JSR
Expressions Hair Design et al. v. Schneiderman

Date	Docket Number	Docket Text
06/04/2013	1	COMPLAINT against Eric T. Schneiderman. * * * *
06/14/2013		Minute Entry for proceedings held before Judge Jed S. Rakoff: Initial Pretrial Conference held on 6/14/2013. * * * *
06/17/2013	11	MOTION for Preliminary Injunction. * * * *
06/17/2013	12	AFFIDAVIT of Linda Fiacco in Support re: 11 MOTION for Preliminary Injunction.. * * * *
06/17/2013	13	DECLARATION of Peter Freeman in Support re: 11 MOTION for Preliminary Injunction.. * * * *
06/17/2013	14	DECLARATION of Donna Pabst in Support re: 11 MOTION for Preliminary Injunction.. * * * *
06/17/2013	15	DECLARATION of Steve Milles in Support re: 11

Date	Docket Number	Docket Text
		MOTION for Preliminary Injunction.. * * * *
06/17/2013	16	DECLARATION of David Ross in Support re: 11 MOTION for Preliminary Injunction.. * * * *
06/17/2013	17	DECLARATION of Deepak Gupta in Support re: 11 MOTION for Preliminary Injunction.. * * * * (Attachments: # 1 Exhibit A: Letters from Consumers Union and Consumer Federation, # 2 Exhibit B: N.Y. Legislative History, # 3 Exhibit C: 2008 N.Y. Insurance Dep't Opinion, # 4 Exhibit D: N.Y. Atty. Gen'l Press Release, # 5 Exhibit E: Excerpt from Connecticut Legislative History, # 6 Exhibit F: N.Y. Atty. Gen'l Formal Opinion (2006), # 7 Exhibit G: 2007 N.Y. Insurance Dep't Opinion) * * * *
06/17/2013	18	MEMORANDUM OF LAW in Support re: 11 MOTION for Preliminary Injunction.. * * * *
06/26/2013	22	ORDER granting 20 Motion for Leave to File Document;

Date	Docket Number	Docket Text
		granting 21 Motion for submit briefs as amici curiae. This action is brought by a group of small retailers and their owners against the Attorney General of New York challenging the constitutionality of a New York statute, N.Y. Gen. Bus. Law 518, which provides that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." Plaintiffs assert that this statute violates the First Amendment, is unconstitutionally vague, and is preempted by federal antitrust laws, and have moved for a preliminary injunction. Now pending before the Court are motions by two groups of nonparties ––– three large national retailers, and four consumer protection organizations ––– seeking leave to submit briefs as amici curiae in support of plaintiffs' motion. In a telephone conference with all relevant counsel on June 20, 2013, the parties indicated that these motions are unopposed. Upon review, the Court finds that the

Date	Docket Number	Docket Text
		proposed briefs will likely "prove helpful to the Court in shedding light on those aspects of the case that the immediate parties may not best situated to address." Weininger v. Castro, 418 F. Supp. 2d 553, 555 (S.D.N.Y. 2006). In particular, the consumer protection organizations may illuminate the statute's effect on consumers, and the large retailers may shed light on the statute's effect on their negotiations with credit card companies over swipe fees. Accordingly, the pending motions for leave to file briefs as amici curiae are hereby granted. The proposed briefs shall be filed no later than July 1, 2013. The Clerk of the Court is directed to close documents numbered 20 and 21 on the docket of this case. SO ORDERED. (Signed by Judge Jed S. Rakoff on 6/26/2013) (rsh) (Entered: 06/26/2013)
07/01/2013	23	BRIEF of *Amici Curiae in Support of Motion for Preliminary Injunction.* Document filed by Safeway Inc., The Kroger Co., Walgreen Co..(Levy, Scott) (Entered: 07/01/2013)

Date	Docket Number	Docket Text
07/01/2013	25	BRIEF of *Amici Curiae in Support of Plaintiffs' Motion for a Preliminary Injunction.* Document filed by Consumer Action, National Association of Consumer Advocates, National Consumers League, U.S. Public Interest Research Group.(Richards, John) (Entered: 07/01/2013)
07/12/2013	26	MOTION to Dismiss. Document filed by Eric T. Schneiderman. * * * *
07/12/2013	27	MEMORANDUM OF LAW in Support re: 26 MOTION to Dismiss., 11 MOTION for Preliminary Injunction.. * * * *
07/15/2013	28	FIRST AMENDED COMPLAINT amending 1 Complaint, against Charles J. Hynes, Gerald Mollen, Eric T. Schneiderman, Cyrus R. Vance Jr.. * * * *
07/29/2013	38	DECLARATION of Donna Zasowski in Support re: 11 MOTION for Preliminary Injunction.. * * * *
07/29/2013	39	DECLARATION of Kevin Rooney in Support re: 11 MOTION for Preliminary

Date	Docket Number	Docket Text
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07/29/2013	40	DECLARATION of Michael Parisi (Corrected) in Support re: 11 MOTION for Preliminary Injunction.. * * * *
07/29/2013	41	DECLARATION of Nicholas J. Damadeo (Corrected) in Support re: 11 MOTION for Preliminary Injunction.. * * * *
07/29/2013	42	DECLARATION of Stephen Milles – Supplemental (Corrected) in Support re: 11 MOTION for Preliminary Injunction.. * * * *
07/29/2013	43	DECLARATION of Linda Fiacco – Supplemental (Corrected) in Support re: 11 MOTION for Preliminary Injunction.. * * * *
07/29/2013	44	DECLARATION of Deepak Gupta – Second Declaration in Support re: 11 MOTION for Preliminary Injunction.. * * * * (Attachments: # 1 Exhibit A: Assurance of Discontinuance Between Parkside Fuel and NY

Date	Docket Number	Docket Text
		Attorney General, # 2 Exhibit B: Assurance of Discontinuance Between Napco Oil Heat and NY Attorney General, # 3 Exhibit C: Assurance of Discontinuance Between Rocky &Marciano and NY Attorney General, # 4 Exhibit D: Press Release, "Attorney General Cuomo Issues Consumer Alert..." (Aug. 28, 2008), # 5 Exhibit E: Press Release, "Attorney General Announces Investigation..." (Aug. 21, 2008), # 6 Exhibit F: Press Release, "Attorney General Announces..." (May 8, 2009), # 7 Exhibit G: Press Release, "Attorney General Cuomo Stops Oneida County Used Car Dealer..." (June 1, 2009), # 8 Exhibit H: Press Release, "Attorney General Cuomo's Investigation Prompts 14..." (Sept. 14, 2009), # 9 Exhibit I: Cease−and−Desist Letter to Valero Gas Station from NY Attorney General)(Gupta, Deepak) (Entered: 07/29/2013)
07/29/2013	45	REPLY MEMORANDUM OF LAW in Support re: 11 MOTION for Preliminary Injunction. and in Opposition to Defendant's Motion to Dismiss.

Date	Docket Number	Docket Text
		* * * *
07/30/2013	46	DECLARATION of John Conover (Corrected) in Support re: 11 MOTION for Preliminary Injunction..
		* * * *
08/07/2013	49	MOTION to Dismiss. Document filed by Charles J. Hynes, Cyrus R. Vance Jr..
		* * * *
08/12/2013	52	SUPPLEMENTAL MEMORANDUM OF LAW in Support re: 11 MOTION for Preliminary Injunction..
		* * * *
08/14/2013		Minute Entry for proceedings held before Judge Jed S. Rakoff: Oral Argument held on 8/14/2013 re: 49 MOTION to Dismiss. filed by Charles J. Hynes, Cyrus R. Vance Jr., 26 MOTION to Dismiss. filed by Eric T. Schneiderman, 11 MOTION for Preliminary Injunction.
		* * * *
08/15/2013	56	ORDER: Now pending before the Court are plaintiffs' motion for a preliminary injunction against defendant the Attorney General of the State of New York and defendants' motion to dismiss. After these motions

Date	Docket Number	Docket Text
		were filed, plaintiffs filed a First Amended Complaint, maintaining the same claims against the Attorney General, but adding three county District Attorneys as new defendants. On July 31, 2013, on consent of the parties, the Court deemed the Attorney General's previously filed motion to dismiss to be directed against the First Amended Complaint, and on August 7, 2013, the District Attorneys joined in that motion to dismiss. On consent of the parties, the Court hereby deems plaintiffs' previously filed motion to seek a preliminary injunction against the District Attorneys in addition to the Attorney General. To the extent the District Attorneys wish to make arguments not presented in the papers already submitted by the Attorney General, answering papers to the motion are due no later than August 28, 2013, with plaintiffs' reply papers due no later than September 4, 2013 (Signed by Judge Jed S. Rakoff on 8/14/2013) (js) Modified on 8/15/2013 (js). (Entered: 08/15/2013)

Date	Docket Number	Docket Text
08/27/2013	59	SUPPLEMENTAL REPLY MEMORANDUM OF LAW in Support re: 11 MOTION for Preliminary Injunction.. * * * *
10/03/2013	63	PRELIMINARY INJUNCTION OPINION AND ORDER: #103662 Accordingly, for the foregoing reasons, the Court hereby preliminarily enjoins the defendants from enforcing section 518 of the New York General Business Law during the pendency of this case, and denies defendants' motion to dismiss in full. In addition, the stay of proceedings imposed on August 14, 2013 is hereby lifted. The parties are directed, within one week of the date of this order, to jointly telephone Chambers to schedule further proceedings in this case. The Clerk of the Court is directed to close documents numbered 26 and 49 on the docket of this case. So Ordered (Signed by Judge Jed S. Rakoff on 10/3/2013) (js) Modified on 10/9/2013 (ca). (Entered: 10/03/2013)
10/25/2013	64	NOTICE of Stipulated Final Judgment. Document filed by

Date	Docket Number	Docket Text
		Eric T. Schneiderman. (Meier, Andrew) (Entered: 10/25/2013)
11/04/2013	65	STIPULATED FINAL JUDGMENT AND PERMANENT INJUNCTION that: (a) This stipulated final judgment is hereby granted; (b) The judgment in favor of plaintiffs rendered by the Court in this stipulated final judgment shall be entered as a final judgment and the clerk is directed to enter such judgment immediately; and (c) It is expressly determined that there is no just reason for delay in this entry of a final judgment on the plaintiffs' First Amendment and Fourteenth Amendment claims pursuant to Rule 54(b). These constitutional claims present legal issues that are independent of the plaintiffs' antitrust preemption claim, which is subject to a fact intensive rule of reason analysis. An immediate appeal of these constitutional claims may avert further litigation on the antitrust preemption claim, thereby avoiding the high costs of fact and expert discovery, motion practice, and potentially a trial. Entry of a final judgment

Date	Docket Number	Docket Text
		on the First Amendment and Fourteenth Amendment claims therefore will be efficient and fair for the court and the parties. (Signed by Judge Jed S. Rakoff on 11/4/13) (Attachments: # 1 Notice of Right to Appeal)(ml) (Entered: 11/05/2013)
12/02/2013	66	NOTICE OF APPEAL from 65 Judgment,,,,,. Document filed by Eric T. Schneiderman. * * * *
12/02/2013	67	NOTICE OF APPEAL from 65 Judgment,,,,,. Document filed by Charles J. Hynes, Cyrus R. Vance Jr.. * * * *

United States Court of Appeals for the Second Circuit
Court of Appeals Docket #: 13-4533
Expressions Hair Design v. Schneiderman

Date	Docket Number	Docket Text
12/02/2013	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Eric T. Schneiderman, FILED. [1105665] [13-4533] [Entered: 12/03/2013 03:21 PM]
12/02/2013	5	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellants District Attorney Charles J. Hynes and Cyrus R. Vance, Jr., FILED. [1105783] [13-4537] [Entered: 12/03/2013 03:52 PM]
03/18/2014	59	CORRECTED BRIEF, on behalf of Appellant Eric T. Schneiderman in 13-4533, Eric T. Schneiderman in 13- 4537, FILED. Service date 03/18/2014 by CM/ECF. [1181042] [13-4533, 13-4537] [Entered: 03/18/2014 06:40 PM]
03/19/2014	62	CORRECTED BRIEF, on behalf of Appellant District Attorney Charles J. Hynes and Cyrus R. Vance, Jr. in 13-4537, FILED. Service date 03/19/2014 by CM/ECF. [1182286] [13-4533, 13-4537] [Entered: 03/19/2014 06:02 PM]

Date	Docket Number	Docket Text
04/11/2014	86	AMICUS BRIEF, on behalf of Amicus Curiae Credit Union Association of New York, FILED. Service date 04/11/2014 by CM/ECF. [1200383] [13-4533]--[Edited 04/15/2014 by JW] [Entered: 04/11/2014 03:07 PM]
06/20/2014	102	AMICUS BRIEF, on behalf of Amicus Curiae The Kroger Co., Safeway Inc., Walgreen Co., Food Lion, LLC, Hy-Vee, Inc., H.E. Butt Grocery Company, The Great Atlantic & Pacific Tea Company, Inc., Albertson's LLC and Rite Aid Corporation, FILED. Service date 06/20/2014 by CM/ECF. [1254053] [13-4533]--[Edited 06/30/2014 by KG] [Entered: 06/20/2014 03:53 PM]
06/26/2014	111	CORRECTED BRIEF, on behalf of Appellee Bunda Starr Corp., Expressions Hair Design, Linda Fiacco, Five Points Academy, Peter Freeman, Steve Milles, Donna Pabst, Patio.com LLC, David Ross and The Brooklyn Farmacy & Soda Fountain, Inc, FILED. Service date 06/26/2014 by CM/ECF. [1258312] [13-4533] [Entered: 06/26/2014 01:03 PM]

Date	Docket Number	Docket Text
06/25/2015	115	REPLY BRIEF, on behalf of Appellant Eric T. Schneiderman, FILED. Service date 06/27/2014 by CM/ECF. [1259753] [13-4533, 13-4537] [Entered: 06/27/2014 08:07 PM]
07/01/2014	119	AMICUS BRIEF, on behalf of Amicus Curiae Consumer Action, National Association of Consumer Advocates, National Consumer League and U.S. Public Interest Research Group, FILED. Service date 07/01/2014 by CM/ECF. [1261630] [13-4533]--[Edited 07/02/2014 by JW] [Entered: 07/01/2014 01:24 PM]
03/05/2015	169	CASE, before RCW, DAL, SLC, C.JJ., HEARD.[1453420] [13-4533, 13-4537] [Entered: 03/05/2015 12:14 PM]
09/29/2015	180	OPINION, vacating the district court judgment and remanding for the dismissal of plaintiffs' claims, by RCW, DAL, SLC, C.JJ., FILED.[1608356] [13-4533, 13-4537] [Entered: 09/29/2015 09:23 AM]
09/29/2015	185	JUDGMENT, FILED.[1609006] [13-4533, 13-4537] [Entered: 09/29/2015 03:27 PM]

Date	Docket Number	Docket Text
11/19/2015	197	PETITION FOR REHEARING/REHEARING EN BANC, on behalf of Appellee Bunda Starr Corp., Expressions Hair Design, Linda Fiacco, Five Points Academy, Peter Freeman, Steve Milles, Donna Pabst, Patio.com LLC, David Ross and The Brooklyn Farmacy & Soda Fountain, Inc in 13-4533, 13-4537, FILED. Service date 11/19/2015 by CM/ECF.[1645967] [13-4533, 13-4537] [Entered: 11/19/2015 10:27 AM]
12/11/2015	210	AMENDED OPINION, by RCW, DAL, SLC, C.JJ., FILED.[1661611] [13-4533, 13-4537] [Entered: 12/11/2015 09:19 AM]
01/12/2016	217	ORDER, petition for rehearing en banc denied, FILED.[1683596] [13-4533, 13-4537] [Entered: 01/13/2016 04:13 PM]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS,

Plaintiffs,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County, CHARLES J. HYNES, in his official capacity as District Attorney of Kings County, and GERALD F. MOLLEN, in his official capacity as District Attorney of Broome County,

Defendants.

No. 13-CIV-3775 (JSR)

FIRST AMENDED COMPLAINT

Introduction

Every time a consumer uses a credit card to make a purchase, the merchant incurs a fee—known colloquially as a "swipe fee." These fees are typically passed on to all consumers in the form of higher prices for goods and services. Both state and federal law, however, permit merchants to pass swipe fees on to only those consumers who pay with credit cards. Merchants may charge two different prices depending on which payment method the consumer uses: a higher price for using a credit card, and a lower price for using other payment methods (cash, a personal check, or a debit card). But, in New York, merchants may engage in dual pricing only if they communicate the difference between the cash price and the credit price using the right *language*: The state allows merchants to offer "discounts" for using cash or a debit card, yet makes it a criminal offense to impose "surcharges" for using a credit card—even though the conduct in both cases (the use of dual pricing) is the same.

This New York no-surcharge law, N.Y. Gen. Bus. Law § 518, violates the First Amendment to the U.S. Constitution, is unconstitutionally vague, and is preempted by federal antitrust law. The plaintiffs are merchants who seek a declaration that the law is unconstitutional and an injunction preventing the State of New York from enforcing the law against them.

Jurisdiction

1. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3).

Parties

2. Plaintiff Expressions Hair Design is a unisex hair salon in Vestal, New York, founded in 2006. For a small business like Expressions, credit-card swipe fees make

an enormous difference. Expressions has found that most of its customers are not aware of the high cost of swipe fees or the ways in which they burden small businesses. But when they learn of the fees, customers are generally sympathetic. Expressions therefore seeks to do what it can to ensure that its customers learn about the cost of using credit cards and take that information into account in deciding how to pay for haircuts and other salon services. Ultimately, Expressions wants credit-card companies to reduce their swipe fees, either as a result of market forces or action by Congress, and is hopeful that educating its customers about swipe fees will cause them to act—both as consumers and as citizens.

3. Until 2012, Expressions posted a sign at its counter informing all customers that, due to the high swipe fees charged by the credit-card industry, Expressions would charge customers 3% more for using a credit card. But Expressions took down its sign and stopped communicating that policy to its customers when one customer (who is also a lawyer) informed the salon that New York law makes it illegal to impose a "surcharge" on customers for paying with a credit card (even though merchants are allowed to provide a "discount" for paying with cash, check, or debit card). Because of the New York no-surcharge law, the salon's current policy is to charge two different prices for haircuts and other services—a lower price for customers paying with cash, check, or debit card and a higher price for customers paying with a credit card. Expressions tries to be as careful as it can to avoid characterizing that price difference as a "surcharge" or an "extra" charge for paying with a credit card, even though its customers *do* effectively pay more for using a credit card.

4. By engaging in dual pricing, Expressions increases its prices to account for the cost of credit cards

(which New York permits) and does so only for those who use credit cards (which New York also permits). But Expressions cannot communicate its price difference in the way that it would like—by calling the difference a "surcharge" for using credit—because New York's no-surcharge law bars Expressions from using that word. Instead, Expressions is forced to describe the lower price as the "cash price" and the higher one as the "credit price," which Expressions believes is far less effective at conveying the costs of credit to its customers (and thus at reducing the amount Expressions pays in swipe fees) than having a "regular price" with a "surcharge" for credit. Indeed, Expressions knows from experience that customers who are presented with an extra charge for using a credit card are much more likely to respond by using a cheaper payment method.

5. Expressions is also concerned that even this less effective way of labeling its pricing could violate the no-surcharge law, depending on how Expressions' staff describe the price difference to customers. If even one staff member inadvertently refers to the difference as a "surcharge" for credit, or says that credit is "extra" or "more," Expressions is afraid that its truthful speech could subject the business to criminal sanctions. This fear is not merely hypothetical: New York has arrested and criminally prosecuted a gas station owner that maintained a similar dual-pricing policy solely because the gas station's cashier used the word "extra" to describe the price difference in a conversation with a customer. *See People v. Fulvio*, 517 N.Y.S.2d 1008 (Crim. Ct. N.Y. 1987). Expressions must therefore be exceedingly vigilant in instructing its staff on how to characterize the price difference, and in monitoring what they say to ensure compliance. Even then, Expressions is unsure what constitutes a surcharge and what constitutes a discount. "If a customer asks us whether

we charge more for paying with a credit card," wonders one of the salon's owners, "should we ignore or dodge the question? Are we required to answer falsely? Or should we say something like the following? 'State law does not allow us to tell you that you are paying more for using a credit card, but we can tell you that you are paying less for not using a credit card.'"

6. Plaintiff Linda Fiacco is one of three co-owners of Expressions Hair Design and is responsible for its day-to-day management.

7. Plaintiff The Brooklyn Farmacy & Soda Fountain, Inc. is an ice-cream parlor and soda fountain in Brooklyn, New York, founded in 2010. It is in a competitive industry with low profit margins, and swipe fees significantly cut into these margins. Brooklyn Farmacy pays an average of 2% to 3% per credit transaction in swipe fees and has paid thousands of dollars in fees since starting the business. Swipe fees are Brooklyn Farmacy's largest non-payroll-related expense besides rent. Although the company tries to reduce credit-card use by requiring a $10-minimum purchase amount to pay with credit, it currently does not have a dual-pricing system. This means that swipe fees get passed on to *all* of Brooklyn Farmacy's customers, cash and credit users alike, in the form of higher prices. And because these fees are kept hidden, customers who meet the minimum purchase amount have no disincentive to use credit—just the opposite, in fact, because of the benefits that most credit cards offer—which raises fees even higher.

8. The reason Brooklyn Farmacy does not offer dual pricing is because of the law's prohibition on speech and also because of its vagueness. As to the former: Brooklyn Farmacy would like to communicate the price difference as a "surcharge" for credit—not a "discount" for cash,

which would make prices look higher than they are—because the company believes that this would most effectively convey the costs of credit to its customers. New York's no-surcharge law blocks it from doing so. As to the latter: The law is so vague about what it prohibits that Brooklyn Farmacy is afraid to have any dual pricing at all, lest it accidentally subject itself to criminal prosecution. The company would have to instruct its employees on the difference between a "surcharge" and a "discount," which even its owners do not fully understand, and then constantly monitor the employees to make sure that each one is sticking to the script. Rather than risk criminal prosecution to say something that it believes is only marginally effective at communicating its message, Brooklyn Farmacy stays away from dual pricing altogether.

9. Plaintiff Peter Freeman is the co-founder of Brooklyn Farmacy and is responsible for its day-to-day management.

10. Plaintiff Bunda Starr Corp. owns Brite Buy Wine & Spirits, a liquor store in lower Manhattan founded in 1980. Brite Buy has accepted credit cards since the mid-1980s, when the New York State Liquor Authority changed its laws to allow liquor to be purchased with credit. Between 60% and 70% of Brite Buy's sales are now made with some form of payment card (usually a credit card), which means that the company incurs swipe fees for most of its sales transactions. Each year, Brite Buy pays tens of thousands of dollars in swipe fees. To cut down on these fees, the company had previously required a minimum purchase amount to pay with a credit card, but that strategy proved ineffective. Brite Buy would like to communicate the cost of credit to customers by calling it a "surcharge," which the company believes would be effective at getting them to

reduce credit use, but New York's no-surcharge law makes using that label a crime.

11. Because of New York's law, Brite Buy does not currently engage in dual pricing, even though it would like to (and even though that conduct is permitted). The company does not do so for the same reasons as Brooklyn Farmacy: (1) because the law imposes criminal punishment on the company's most effective way of conveying to its customers the true costs of credit, and (2) because the law's vagueness leaves the company uncertain as to whether it could implement a dual-pricing system in a lawful way.

12. Plaintiff Donna Pabst is president of Bunda Starr Corp. and is responsible for Brite Buy's day-to-day management.

13. Plaintiff Five Points Academy is a martial arts and fitness studio in lower Manhattan founded in 2003. It pays on average between 2.4% and 3.3% per credit transaction in swipe fees. Over the years, an increasing percentage of Five Points' members have chosen to pay their monthly dues and other expenses by credit card. This has caused a sharp increase in the amount the company pays each year in fees, to the point where it paid more than $50,000 in fees in 2012 alone. Five Points wants to offer a dual pricing system, but it will do so only if it can communicate the price difference as a "surcharge" for using credit (which the company believes is the best way to convey the costs of credit) and only if the law is clear about what it permits (and what it criminalizes). New York's no-surcharge law prevents both of these conditions from being satisfied.

14. Plaintiff Steve Milles is Vice President of Five Points Academy and is responsible for its day-to-day management.

15. Plaintiff Patio.com LLC is an outdoor furniture and billiards company founded in 1984. It has stores in Mount Kisco, Scarsdale, South Hampton, and Westbury, New York, as well as in six other states and online. Credit cards have become an increasingly popular payment method among Patio.com's customers. About 80% of the company's storefront sales are now made with a credit card. Patio.com pays on average between 2% and 3% per credit transaction in swipe fees. It paid more than $200,000 in swipe fees in 2012.

16. New York's no-surcharge law harms Patio.com in at least two ways. The law prevents the company from informing its customers of swipe fees by imposing a "surcharge" for credit, which it would like to do. And the law effectively prevents the company from having a dual-pricing system by (1) outlawing the most effective way of conveying that system and (2) being so unclear about how such a system can be lawfully described.

17. Plaintiff David Ross is the founder and president of Patio.com LLC, and is responsible for its day-to-day management.

18. Defendant Eric T. Schneiderman is the Attorney General of New York and is responsible for enforcing the laws of the state, including the state's no-surcharge law. Defendant Cyrus R. Vance, Jr. is the District Attorney of New York County and is responsible for representing the People of the State of New York in criminal proceedings in New York County. Defendant Charles J. Hynes is the District Attorney of Kings County and is responsible for representing the People of the State of New York in criminal proceedings in Kings County. Defendant Gerald F. Mollen is the District Attorney of Broome County and is responsible for representing the People of the State of New York in criminal proceedings

in Broome County. Each defendant is sued in his official capacity.

Factual Background

19. Americans pay some of the highest swipe fees in the world—seven or eight times those paid by Europeans, according to estimates by the Merchants Payments Coalition. The main reason swipe fees are so high is that they are kept hidden from consumers, who decide which payment method to use and thus determine whether a fee will be incurred in the first place. According to one survey, about 41% of American credit-card users are completely unaware that merchants are charged fees to process credit-card transactions. Although merchants are allowed to charge consumers more for using credit than for using cash, merchants cannot effectively communicate that added cost because New York and other states force them to call it a "discount" for cash rather than a "surcharge" for credit.

20. New York's no-surcharge law makes it a criminal offense—punishable by a fine of $500 and up to one year of imprisonment—for any "seller in any sales transaction [to] impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. New York's no-surcharge law does *not*, however, outlaw dual pricing. This is clear from (1) the state's own interpretation of the law, (2) the law's legislative history, (3) the only court decision to have addressed the question, and (4) federal law.

21. As the state itself has recognized, the no-surcharge law "'prohibits a vendor from charging a surcharge for credit card usage, but would not interfere with that same vendor establishing the higher price for credit card sales and then allowing a comparable discount for cash purchases.'" *Fulvio*, 517 N.Y.S.2d at

1011 (ellipsis omitted) (quoting prosecutor's memorandum). That is, "'[c]ash discounts are allowed, credit surcharges are impermissible.'" *Id.* at 1014. Moreover, the state has applied that distinction to cover speech uttered by employees, having prosecuted a gas-station owner because the station's cashier told a customer that using a credit card would cost "extra"—even though the station's pricing system was otherwise lawful. *Id.* at 1010.

22. The no-surcharge law's differential treatment of "surcharges" and "discounts" is also reflected in the law's legislative history, which makes clear that, under the law, a "merchant would be able to offer a discount for cash if they so desire." And the only court to address the line between "surcharges" and "discounts" interpreted the no-surcharge law as prohibiting the former but permitting the latter, in part because the purpose of the law was "to fill the gap created by expiration of the federal ban on surcharges" (which is discussed below), with the understanding that the federal "provision permitting a merchant to offer a discount for cash would still be permitted." *Id.* at 1012.

23. Until January 2013, New York's no-surcharge law was effectively redundant because credit-card companies imposed similar speech prohibitions in their contracts with merchants. But after federal antitrust litigation caused the two dominant credit-card companies (Visa and MasterCard) to change their contracts to remove their no-surcharge rules, New York's law took on added importance. It is now the only thing keeping the plaintiffs from saying what they would like: that they impose a "surcharge" for using credit because credit costs more.

I. Why labels matter: the communicative difference between "surcharges" and "discounts"

24. A "surcharge" on credit and a "discount" for cash "are different frames for presenting the same price information—a price difference between two things." Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1351-52 (2008). They are identical in every way except one: the *label* that the merchant uses to communicate that price difference.

25. But labels can matter. "[T]he frame within which information is presented can significantly alter one's perception of that information, especially when one can perceive the information as a gain or a loss," as with the price difference between using cash and using credit. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence Of Market Manipulation*, 112 Harv. L. Rev. 1420, 1441 (1999). This is largely because of a well-known cognitive phenomenon called "loss aversion," which refers to people's tendency to let "changes that make things worse (losses) loom larger than improvements or gains" of an equivalent amount. Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991). Put more simply: "people have stronger reactions to losses and penalties than to gains." Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 280 (2006).

26. Because of this, "[c]onsumers react very differently to surcharges and discounts," even though they present the exact same pricing information. *Id.* Consumers are more likely to respond to surcharges (which are perceived as *losses* for using credit) than to

discounts (which are perceived as *gains* for not using credit). *Id.* Research shows just how wide this gap is. In one study, 74% of consumers had a negative or strongly negative reaction to credit surcharges, while fewer than half had a negative or strongly negative reaction to cash discounts. That difference—the difference in how the same pricing information is understood by consumers—influences their behavior, making "surcharges" a much more effective way to communicate the costs of credit to consumers.

27. The effectiveness of surcharges is why the plaintiffs in this case seek to impose them: surcharges inform consumers of the costs of credit, letting consumers decide for themselves whether credit's benefits outweigh its costs. That exchange of information creates meaningful competition, which in turn drives down costs—as demonstrated by price-transparency reforms in Europe and Australia. If consumers are made aware of swipe fees and determine that they are too high, consumers will use a different payment method, and banks and credit-card companies will have to lower their fees to attract more business. Indeed, in Australia, where regulators in 2003 allowed complete transparency of price information and merchants have responded with surcharges, swipe fees have greatly declined.

28. But when the government criminalizes framing the added cost of credit as a "surcharge," as New York has done, merchants lose their most effective means of informing consumers of the high costs of credit. Moreover, because the dividing line between what constitutes a "surcharge" and what constitutes a "discount" is so blurry, many merchants (including many of the plaintiffs in this case) do not even attempt to offer dual pricing, even though the law allows it, to avoid accidentally subjecting themselves to criminal punishment. And many other merchants falsely believe

that they may not offer any dual pricing at all. The upshot, then, is that merchants end up passing on swipe fees to *all* consumers by raising the prices of goods and services across the board. This means that consumers are unaware of how much they pay for credit and have no incentive to reduce their credit-card use because they will pay the same price regardless. As a result, swipe fees have soared.

29. Swipe fees thus function as an invisible tax, channeling vast amounts of money from consumers to some of the nation's largest banks and credit-card companies. Because cash and credit purchasers both pay this tax, swipe fees are also highly regressive: low-income cash purchasers subsidize the cost of credit cards, while enjoying none of their benefits or convenience. According to Federal Reserve economists, "[b]y far, the bulk of [this subsidy] is enjoyed by high-income credit card buyers," who receive an average of $2,188 every year, paid disproportionately by poor and minority households.

30. For these reasons, numerous prominent economists and consumer advocates—from Joseph Stiglitz to Elizabeth Warren—have opined that no-surcharge policies are bad for consumers and hurt competition.

II. The credit-card industry's concerted efforts to prevent merchants from communicating the costs of credit as "surcharges"

31. The invisibility of swipe fees is no accident. It is the product of concerted efforts by the credit-card industry over many decades to ensure that merchants cannot communicate to consumers the added price they pay for using credit. Over the years, the industry has succeeded, both through contractual provisions and

legislative measures, to silence merchants' attempts to call consumers' attention to the true costs of credit.

The industry's early ban on differential pricing ends

32. In the early days of credit cards, any attempt at differential pricing between credit and non-credit transactions was strictly forbidden by rules imposed on merchants in their contracts with credit-card companies. That changed in 1974 after two important developments. *First*, Consumers Union sued American Express on the ground that its contractual ban on differential pricing was an illegal restraint on trade. Rather than face the prospect that federal courts would mandate full price transparency, American Express almost immediately settled the suit by agreeing to allow merchants to provide consumers with differential price information.

33. *Second*, Congress then enacted legislation protecting the right of merchants to have dual-pricing systems. Congress amended the Truth in Lending Act to provide that "a card issuer may not, by contract, or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card." Pub. L. No. 93, § 495, 88 Stat. 1500 (1974).

The credit-card industry shifts its strategy to labeling

34. The 1974 amendments were initially considered a victory for consumers. But the credit-card industry, seizing on Congress's use of the word "discount," soon shifted its focus to the way merchants could *label* and *describe* such pricing to consumers. Aware that how information is presented to consumers can have a huge impact on their behavior—and that many merchants would avoid dual pricing altogether if "surcharges" were outlawed—the credit-card lobby "insist[ed] that any

price difference between cash and credit purchases should be labeled a cash discount rather than a credit card surcharge." Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251, S261 (1986).

The credit-card industry's labeling strategy achieves short-lived success at the national level

35. In 1976, after two years of lobbying Congress to impose the credit-card industry's preferred speech code, the industry succeeded in getting Congress to enact a temporary ban on "surcharges," despite the authorization for "discounts." *See* Pub. L. No. 94–222, 90 Stat. 197 ("No seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means."). This controversial measure set the stage for a series of battles over renewal of the ban, culminating in an intense political debate in the mid-1980s that pitted both the Reagan Administration and consumer groups against the credit-card industry.

36. With the "surcharge" ban set to expire in 1981, the federal government and consumer advocates registered the impact that it had on consumers' and merchants' behavior. The Chairman of the Federal Trade Commission, writing in opposition to extending the law, recognized that the "surcharge" label drives home the true marginal cost of a credit transaction to the consumer. S. Rep. 97-23, at 11-12. Although "a discount and a surcharge are equivalent concepts," he remarked, "one is hidden in the cash price and the other is not," meaning that a ban on "surcharges" prohibited merchants from disclosing to their customers the true cost of credit. *Id.* at 10. Despite the opposition, Congress gave in to industry lobbying and renewed the law for an additional three years. Pub. L. 97–25, 95 Stat. 144 (1981).

37. In 1984, the no-surcharge law was again set to expire. Senator William Proxmire of Wisconsin, one of the ban's chief opponents, cut to the chase: "Not one single consumer group supports the proposal to continue the ban on surcharges," he observed. "The nation's giant credit card companies want to perpetuate the myth that credit is free." Irvin Molotsky, *Extension of Credit Surcharge Ban*, N.Y. Times, Feb. 29, 1984, at D12. The credit-card industry, acutely conscious of the threat that merchants' disclosure of credit's true cost posed to its business model, responded by unleashing a massive lobbying campaign to oppose ending the ban. Stephen Engelberg, *Credit Card Surcharge Ban Ends*, N.Y. Times, Feb. 27, 1984, at D1. One senior vice president of Shearson/American Express remarked in 1984 that his company had been opposing ending the ban for eight years. He observed that consumers do not write angry letters to credit-card companies about cash discounts, but do complain about surcharges. *Id.* He concluded that ending the ban "could potentially hurt the image of" credit cards, revealing that the industry viewed its legislative efforts as playing a key role in dictating the perception of credit cards among consumers. *Id.* The industry's efforts failed, and the ban lapsed in 1984. Levitin, *Priceless?*, 55 UCLA L. Rev. at 1381.

38. A 1981 report of the Senate Banking Committee, prepared as part of the law's initial renewal, stressed the law's role in regulating how a merchant could frame a dual-pricing system. The Committee observed that "while discounts for cash and surcharges on credit cards may be mathematically the same, their practical effect and the impact they may have on consumers is very different." S. Rep. 97-23, at 3. The no-surcharge law thus effectively set forth a speech code, requiring that merchants label their prices in the way that best hid the costs of credit and most enabled the credit-card

companies to take advantage of the framing effect: by advertising the credit price as the "regular" price, and the cash price as a "discount" from that price.

39. Furthermore, the vague distinction between "discounts" and "surcharges," and the risk of inadvertently describing a dual-pricing system in an unlawful way, led merchants to steer clear of such systems. In an editorial in *The New York Times*, Senator Christopher Dodd of Connecticut, a proponent of allowing surcharges, noted that "many merchants are not sure what the difference between a discount and a surcharge is and thus do not offer different cash and credit prices for fear they will violate the ban on surcharges." Sen. Christopher J. Dodd, *Credit Card Surcharges: Let the Gouger Beware*, N.Y. Times, Mar. 12, 1984, at A16. *See also* Carol Krucoff, *When Cash Pays Off*, Wash. Post, Sept. 22, 1981 (describing consumer activist who argued that merchants have not offered cash discounts because "the regulations have been so complicated. Smaller business people, who are most likely to offer them, may have been intimidated by the fear it could be viewed as an illegal surcharge."); Engelberg, *Credit Card Surcharge Ban Ends*, at D1 ("A House aide said that one explanation for the relative unpopularity of cash discounts is that retailers, aware that surcharges on credit purchases are illegal, have erroneously assumed that discounts are not permitted.").

The credit-card industry lobbies the states to enact no-surcharge laws and adopts contractual no-surcharge rules

40. After the controversial federal ban expired, the credit-card industry briefly turned to the states, convincing fewer than a dozen (including New York) to enact no-surcharge laws of their own. In an early instance of the phenomenon now known as

"astroturfing," American Express and Visa went to great lengths to create the illusion of grassroots support for such laws, even going so far as to create and bankroll a fake consumer group called "Consumers Against Penalty Surcharges." But real consumer groups—including Consumers Union and Consumer Federation of America—opposed state no-surcharge laws because they discouraged merchants from making the costs of credit transparent, which resulted in an enormous hidden tax paid by all consumers whenever they made a purchase.

41. New York's law took effect in June 1984, just after expiration of the temporary federal ban. N.Y. Gen. Bus. Law § 518. The law's legislative history does not hide the fact that it was intended to influence consumers' perceptions of credit cards by controlling the labels that merchants may use to describe mathematically equivalent transactions. For example, one state official justified the law as follows: "Surcharges, even if only psychologically, impose penalties on purchasers and may actually dampen retail sales. A cash discount, on the other hand, operates as an incentive and encourages desired behavior." Memorandum from Mollie Lampi, Associate Counsel, State Consumer Protection Board, to Gerald C. Crotty, Counsel to the Governor (June 1, 1984).

42. The only court to analyze the New York no-surcharge law concluded that, under the law, "precisely the same conduct by an individual may be treated either as a criminal offense or as lawfully permissible behavior depending only upon the *label* the individual affixes to his economic behavior, without substantive difference." *Fulvio*, 517 N.Y.S.2d at 1011 (emphasis in original). The court explained: "[W]hat General Business Law § 518 *permits* is a price differential, in that so long as that differential is characterized as a discount for payment by cash, it is legally permissible; what General Business

Law § 518 *prohibits* is a price differential, in that so long as that differential is characterized as an additional charge for payment by use of a credit card, it is legally impermissible. . . . General Business Law § 518 creates a distinction without a difference; it is not the *act* which is outlawed, but the *word* given that act." *Id.* at 1015 (emphasis in original).

43. Around the same time that New York's no-surcharge law was enacted, the major credit-card companies changed their contracts with merchants to include no-surcharge rules. No-surcharge laws in New York and other states thus function as a legislative extension of the restrictions that credit-card issuers imposed more overtly by contract. For instance, American Express's contracts with merchants include an elaborate speech code. The contracts provide that merchants may not "indicate or imply that they prefer, directly or indirectly, any Other Payment Products over our Card"; "try to dissuade Cardmembers from using the Card"; "criticize ... the Card or any of our services or programs"; or "try to persuade or prompt Cardmembers to use any Other Payment Products or any other method of payment (e.g., payment by check)."

The Durbin Amendment and the recent political controversy over swipe fees

44. From the mid-1980s until the 2000s the issue of swipe fees remained largely in the shadows. Even in the majority of states without anti-surcharge laws, the contractual no-surcharge rules ensured that consumers were rarely informed of the true costs of credit. Developments in the late 2000s, however, caused swipe fees to reemerge as a volatile political issue.

45. The global financial crisis of 2007-2008 and the ensuing push for financial-regulation reform resulted in renewed focus on swipe fees. Senator Dick Durbin of

Illinois proposed an amendment to the Senate version of the Dodd-Frank Wall Street Reform and Consumer Protection Act that aimed to reduce the fees associated with transactions by both debit and credit cards. Although proposed legislation to regulate *credit-card* swipe fees was defeated, the Durbin Amendment was enacted into law. As enacted, it establishes a procedure by which the Federal Reserve Board now sets the maximum swipe fees for *debit-card* transactions. 15 U.S.C. § 1693o-2(a). It also includes a provision protecting merchants' rights to offer consumers incentives for using different payment methods: "A payment card network shall not ... by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person to provide a discount or in-kind incentive for payment by the use of cash, checks, debit cards, or credit cards." *Id.* § 1693o-2(b)(2).

46. The fight over the Durbin Amendment shone a spotlight on the amount of revenue that banks generate from swipe fees, initiated a frenzy of lobbying by the credit-card industry, and touched off a contentious national political debate. Many merchants sought to convey their opposition to swipe fees directly to their customers—and voters—at the checkout counter. The national convenience store chain 7-Eleven, for example, put up signs asking customers to "STOP UNFAIR CREDIT CARD FEES" and gathered a total of 1.6 million signatures on a petition to support legislation on credit-card fees. 7-Eleven claimed that its petition represented the largest quantity of signatures ever presented to Congress—trumping even the 1.3 million signatures presented to Congress regarding national healthcare reform.

Visa & MasterCard drop their no-surcharge rules

47. In May 2005, Animal Land Inc., a pet-relocation company based in Atlanta, Georgia, sued Visa for a declaration that its no-surcharge rule violated antitrust laws by preventing Animal Land and other merchants from assessing a discrete, denominated charge upon customers using credit cards, as opposed to cash, checks, or debit cards. *Animal Land, Inc. v. Visa USA, Inc.*, No. 05-CV-1210 (N.D. Ga.). In the ensuing months, numerous U.S. merchants and trade associations brought claims against the dominant credit-card networks, alleging that they engaged in illegal price-fixing and impermissibly banned merchants from encouraging customers to use less expensive payment methods. The lead plaintiff in the lawsuit was Mitch Goldstone, the owner of a small photo-processing business. Troubled by consumers' ignorance about swipe fees and merchants' passive acceptance of them, Goldstone became an activist against the credit-card issuers, challenging their business practices in media interviews and blog postings in addition to his role as lead plaintiff in the lawsuit.

48. Under the terms of a national class-action settlement, Visa and MasterCard in January 2013 dropped their prohibitions against merchants imposing surcharges on credit-card transactions. As a result, state no-surcharge laws—previously redundant because of contractual no-surcharge rules—have now gained added importance. And as they did in the 1980s, credit-card companies are once again seeking to discourage dual pricing by pushing state legislation that dictates the labels that merchants can use for such systems.

Claims for Relief

Claim One: Violation of the First Amendment (under 42 U.S.C. § 1983)

49. New York's no-surcharge law regulates how the plaintiffs may characterize the price differences they may lawfully charge for credit and cash purchases. The law allows them to tell their customers that they are paying *less* for using cash or other means of payment (a "discount"), but not that they are paying *more* for using credit (a "surcharge"). This state-imposed speech code prevents the plaintiffs from effectively conveying to their customers—who absorb the costs of credit through higher prices for goods and services—that credit cards are a more expensive means of payment.

50. By prohibiting certain disfavored speech by merchants—and enforcing that prohibition with criminal penalties—New York's no-surcharge law violates the plaintiffs' First Amendment rights, as applied to the states through the Fourteenth Amendment. Because the no-surcharge law is a content- and speaker-based restriction on speech, it is subject to heightened scrutiny under the First Amendment. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011). Regardless of whether the law is analyzed under a special commercial speech inquiry, it cannot survive. The prohibited speech concerns lawful activity (engaging in dual pricing) and is not misleading; New York has no substantial interest in prohibiting the speech; and New York's no-surcharge law does not directly advance—and is far more extensive than necessary to serve—any interest the state might have. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).

Claim Two: Void for vagueness (under 42 U.S.C. § 1983)

51. New York's no-surcharge law does not provide guidance about what speech is permitted and invites arbitrary and discriminatory enforcement. Because the law makes criminal liability turn on the blurry difference between two ways of describing the same conduct, the law does not provide a person of ordinary intelligence reasonable opportunity to know what is prohibited. Additionally, the law lacks explicit standards for those charged with its enforcement. It is therefore unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment.

Claim Three: Sherman Act preemption (under 42 U.S.C. § 1983)

52. New York's no-surcharge law allows credit-card companies to keep the costs of credit hidden from consumers by preventing merchants from communicating these costs in an effective manner. The prohibition on communication insulates credit-card companies from competition, causes the costs of credit to skyrocket, and frustrates the purposes of federal antitrust law—just as Visa and MasterCard's no-surcharge rules did. Because those rules constituted an antitrust violation, the no-surcharge law that now carries them out does so as well. *See Calif. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Hertz Corp. v. City of New York*, 1 F.3d 121 (2d Cir. 1993). The New York law violates, and is preempted by, the Sherman Act. 15 U.S.C. § 1 *et seq.*

Request for Relief

The plaintiffs request that the Court:

A. Declare that New York's no-surcharge law is unconstitutional and preempted by the Sherman Act, and enjoin its enforcement;

B. Award the plaintiffs their reasonable costs, expenses, and attorney's fees under 42 U.S.C. § 1988; and

C. Grant the plaintiffs all other appropriate relief.

July 15, 2013

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF STEPHEN MILLES

STEPHEN MILLES hereby declares:

1. I am the Vice President of Five Points Academy ("Five Points"), a martial arts school and fitness center located at 277 Canal Street in New York City. As the Vice President, I am responsible for the day-to-day management of Five Points, including setting up and maintaining Point of Sale software, repairing and maintaining the physical infrastructure of the facility, training and assigning instructors, determining the class schedule, teaching classes and individual sessions,

maintaining the facility website and social media pages and other assorted tasks.

2. Five Points has been operating a martial arts and fitness studio in the Canal Street and Broadway area for the past ten years. We offer beginning and advanced training in Muay Thai, Kali, and Judo, as well as more traditional strength and conditioning training.

3. Five Points has been accepting credit cards since its inception. Over the years, more and more of our members have used credit cards to pay their membership dues, as well as purchase classes, personal training sessions and the gym goods (e.g., water, Muay Thai equipment) that we sell. Currently, about 90% of Five Points' sales are on credit cards. When a member uses his or her crdit card, Five Points typically pays between 2.4% and 3.3% of the transaction total in merchand discout fees or "swipe fees". In contrast, if a member pays using a debit card, Five Points pays only 1.75% of the transation total in swipe fees. Obviously, Five Points pays no swipe fees if the member pays in cash or with a check. Last year alone Five Points paid over $50,000 in swipe fees; these fees represent our second largest non-staff related expense after rent and utilities.

4. Five Points' pricing has had to keep pace with the high cost of accepting credit cards. As it currently stands, Five Points must include the costs of accepting credit cards in the prices that we charge to all our members. By prohibiting us from charging different prices for cash and credit, and labeling that difference as a "surcharge," New York law in effect prohbits Five Points from informing consumers that we are passing along the cost of using credit directly to members who chose to pay with credit cards.

5. Five Points would like to impose a surcharge if a member pays with a credit card and to tell our members that there is no charge if they pay with a debit card, cash or a check. We believe that being able to impose a surcharge would fairly allocate the costs associated with credit card usage. Such a surcharge would also cause many of our members to switch their payment form to debit, cash or check, which are significantly cheaper for us. Switching members to cheaper payment forms and collecting a surcharge on credit card transactions for those members who choose to pay with a credit card would provide substantial cost savings to Five Points and would allow us to keep our prices down.

6. We have been informed that Five Points could tell members that we will give them a discount if they pay with cash, check or a debit card. While such a discount is, as a matter of mathematical calculation, the same as imposing a surcharge on credit card usage, it is not the same as a matter of business reality. People react very differently to a surcharge than to a discount. Five Points firmly believes that a surcharge will cause many members to switch payment forms and that a discount won't provide anywhere near the same motivation to switch, particularly for our members who like to earn rewards points on their credit cards.

7. There are also substantial difficulties in monitoring how our employees would express any such discount consistent with New York law, which, as best we can tell, would prohibit our employees from telling members that they will pay more if they use credit cards but would allow employees to tell members that they will pay less if they don't use credit cards. Neither I nor my partners are convinced that we understand this distinction completely, and we certainly do not have any confidence that our employees could or would observe that distinction in practice. Given that the New York no-

surcharge law imposes criminal penalties, we are certainly not willing to take that risk.

8. Nor are we willing to risk having a designated line item on our member invoices that informs members about the costs that credit card acceptance impose on Five Points being deemed a violation of New York law. While Five Points would like to add such a line item to monthly invoices to our members and show our members how much Five Points is paying in processing costs when they use a credit card, we are afraid that such a line item would be considered a "surcharge" under the New York law.

I declare under penalty of perjury the foregoing is true and correct.

Dated: New York, New York
May 22, 2013

s/ Stephen Milles
Stephen Milles

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF DONNA PABST

DONNA PABST hereby declares:

1. I am the President of Bunda Starr Corp, which owns Brite Buy Wine and Spirits ("Brite Buy") in Lower Manhattan. Brite Buy sells fine wines and spirits at a range of price points. I am responsible for the day-to-day management of Brite Buy, including choosing vendors, overseeing the store's financial accounting and bookkeeping, managing Brite Buy's employees and ordering the wine and spirits that are sold at the store.

2. Brite Buy opened in 1980 and has resided in Lower Manhattan for the past twenty three years. We began accepting credit cards in the mid-1980s when the New York State Liquor Authority first began to permit sales of liquor to customers using a credit card. Currently, between 60% and 70% of Brite Buy's sales are on some form of payment card. The merchant fees associated with accepting credit cards—fees that have consistently risen over the years—represent an enormous expense for Brite Buy. Each year, Brite Buy pays tens of thousands of dollars in merchant fees. And over the years, these fees have increased, not decreased. After rent, merchant fees are Brite Buy's single largest operating expense. These expenses cause Brite Buy to raise its prices.

3. Brite Buy has attempted a number of strategies to stem the tide of the ever rising merchant fees imposed by the credit card companies. For example, Brite Buy encouraged customers to pay with cash for smaller purchases for many years by imposing a minimum purchase requirement for credit cards.

4. The success of such strategies has been minimal given the lack of incentive to switch payment forms that such strategies provide and the desire of many of our customers to earn points with their credit cards. Brite Buy would instead like to use the proven tool of imposing a "surcharge" on customers who use credit cards. We believe that customers will react primarily in one of two ways when faced with a surcharge, both of which assist Brite Buy in lowering its operating expenses: First, many customers will react to a surcharge on credit card usage by switching their payment form from a credit card to cash, check or a debit card, each of which is substantially less expensive for Brite Buy. Alternatively, customers will continue to use their credit cards and pay the surcharge. Brite Buy understands that until

surcharging takes hold in the United States, some customers will also choose to not make a purchase and go to a different store. On balance, Brite Buy believes that the loss of business from those customers will be far outweighed by the savings that result from moving customers to a lower cost form of payment or recouping card processing expenses through the surcharge. These cost savings will allow Brite Buy to keep our prices down.

5. We also believe that imposing a surcharge on credit card usage is a more appropriate way to pass along the costs associated with credit card acceptance. Right now, Brite Buy must include the high costs of credit acceptance in its prices and cannot, consistent with New York law, transparently pass along those costs only to those customers who choose to pay with a credit card. We believe that it is unfair to force customers who use low cost payment forms to pay higher prices for the benefit of customers who choose to use their credit cards. A surcharge is the most effective way to end the de facto subsidy that flows from debit-paying and cash-paying customers to credit card-paying customers. Brite Buy understands that is allowed to in effect charge more to customers who pay with credit cards by labeling the difference as a "discount" for customers who pay with cash, check, or debt card. We also understand that such a "discount" is economically the same thing as a "surcharge," but those two labels produce very different customer interactions. Customers who want to pay with a credit card are much less likely to switch their method of payment when faced with a "discount" than they are when faced with a "surcharge." We want to inform our customers that they would be paying *more* when they use a credit card and calling the difference a "discount" will not effectively convey that message.

6. There is another real-world difficulty in implementing a discounting regime under New York's law: training and monitoring Brite Buy's employees. It is very difficult to explain to employees tasked with ringing up sales that the employee can tell a customer that he or she will pay less if they don't use credit cards but that the employee cannot tell that same customer that he or she will pay more if they use credit cards. Monitoring the day-to-day use of such a tortured verbal formulation would be next to impossible. Given the criminal penalties that New York's no-surcharge law carries, it would be too risky for Brite Buy to try to implement a discounting regime even if such a regime would be effective (which it would not).

I declare under penalty of perjury the foregoing is true and correct.

Dated: New York, New York

May 24, 2013

s/ Donna Pabst

Donna Pabst

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs,* v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant.*	No. 13-CIV-3775 (JSR)

DECLARATION OF PETER FREEMAN

PETER FREEMAN hereby declares:

1. I am the co-founder, along with my sister Gia Giasullo, of The Brooklyn Farmacy & Soda Fountain, Inc. ("Brooklyn Farmacy"), a cafe-style ice cream parlor and soda fountain in Carroll Gardens, Brooklyn. I am responsible for the day-to-day management of Brooklyn Farmacy, including training and managing our waitstaff, overseeing the financial accounting and bookkeeping for the business, and ordering and sourcing the ingredients that we use and retail items that we sell.

2. Brooklyn Farmacy was opened in 2010 after a year-long renovation of a 1920's pharmacy that had been derelict for many years. Brooklyn Farmacy considers itself a part of the Carroll Gardens community and seeks to cultivate a connection with its customers. As such, Brooklyn Farmacy routinely allows local organizations, such as the South Brooklyn Children's Garden and Local Roots CSA (community supported agriculture) to hold meetings in our back parlor. Brooklyn Farmacy has also made a commitment to locally source ingredients. For example, we buy fresh milk from Hudson Valley and strawberries from Long Island for our egg creams. In addition, we sell artisanal foods and goods from Brooklyn-based companies.

3. Brooklyn Farmacy has been accepting credit cards since its inception. While we considered accepting only cash, we determined that such an option was not viable for our retail business. About 40% of our sales are on credit cards. On average, we pay between 2% and 3% of the transaction total for sales involving credit cards. Since we started business in 2011, Brooklyn Farmacy has paid thousands of dollars in credit card merchant swipe fees.

4. Swipe fees are Brooklyn Farmacy's second largest non-payroll related operating expense after rent and utilities. To encourage customers to pay cash for smaller purchases, and because of the costs associated with accepting credit cards, we have a $10 minimum purchase requirement if a customer uses a credit card. When customers ask why we impose a minimum purchase—or why we don't accept American Express cards—we explain that it is because of the high fees that the credit card companies charge us when customers use their credit cards. For the most part, our customers have been supportive of our choice. They are often surprised to learn how much Brooklyn Farmacy is charged by the

credit card companies, particularly when contrasted to the high interest rate that many customers are charged when they carry a credit card balance.

5. When we first started the business, we were shocked at the high merchant fees that the credit card companies were charging. That shock quickly turned into outrage as we realized that small merchants such as Brooklyn Farmacy were powerless to fight back against these fees, which are set on take-it-or-leave-it basis. We want to do what we can to inform our customers about the high fees and encourage them to use cash instead of credit, and, ultimately, to encourage credit-card companies to lower the fees.

6. With the recent changes in Visa's and MasterCard's rules to permit merchants to impose a "surcharge" for credit-card transaction, merchants have a means of asserting some control over their credit card processing costs. Unfortunately, for merchants like Brooklyn Farmacy that are located in New York, the potent tool of surcharging is rendered meaningless by New York's no-surcharge law.

7. For multiple reasons, Brooklyn Farmacy would like to charge more for credit card transactions and label that price difference as a "surcharge" rather than a "discount." First, doing so would allow us to properly allocate the costs of credit card acceptance to those customers who use credit cards rather than including those costs in the prices that we charge all customers, as we do now. It is not fair to require our customers who pay with cash to pay higher prices for the benefit of those customers who pay with their credit cards. Second, surcharging credit card usage would allow Brooklyn Farmacy to effectively inform our customers about the costs that the credit card companies impose on merchants in a manner that will cause them to pay

attention. This is an important political and economic issue, and Brooklyn Farmacy wants to be able to use the strongest messaging possible with our customers and members of the community. Third, surcharging will allow Brooklyn Farmacy to lower its operating costs, which will allow us to keep our prices down.

8. We understand that Brooklyn Farmacy could legally charge customers more for using credit cards if we were to label the price difference as a "discount" for using cash or debit rather than a "surcharge" for using credit. That alternative, however, would be unacceptable for a variety of reasons. It would make our advertised prices look higher than they are, without making it transparent that the higher price would be due solely to credit card transaction costs—precisely the information we wish to convey to our consumers. Labeling the difference as a "discount" therefore, would not be nearly as effective as calling it a "surcharge." Even though they are mathematically the same thing, our customers would react very differently to a surcharge than to a discount, which is why these two labels—a 2% "surcharge" on the one hand and a 2% "discount" on the other—play out very differently in the real world. While we firmly believe that a "surcharge" would cause many customers to switch payment forms and/or allow Brooklyn Farmacy to recoup its processing costs, we do not believe that an equivalent "discount" would provide the same incentives. In addition, for our customers who are already inclined to pay with cash or a debit card, the discount is an unnecessary incentive and would be giving away money that otherwise could have been saved. In contrast, a surcharge on credit card usage targets the customers whose behavior we want to impact—customers who want to pay with a credit card.

9. There is another very practical obstacle to framing any price difference as a discount in New

York—namely, monitoring how our waitstaff would express such a "discount" in light of the state's no-surcharge law. We understand that the wait staff could legally tell customers that they will pay *less* if they don't use credit cards. But we are afraid that they would also (truthfully) tell our customers that they are effectively paying *more* by using a credit card, and that we would be in violation of the New York no-surcharge law if they did so. This distinction is difficult to understand and we do not feel that our waitstaff would be able to observe that distinction in practice. We are not willing to take the risk that we might be prosecuted by the state simply for conveying truthful information to our customers about the higher cost of using a credit card.

I declare under penalty of perjury the foregoing is true and correct.

Dated: Brooklyn, New York

May 25, 2013

s/ Peter Freeman

Peter Freeman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF DAVID ROSS

DAVID ROSS hereby declares:

1. I am the President of Patio.com LLC ("Patio.com"), a New York limited liability company. I am responsible for the day-to-day management of the company, as well as long term financial planning.

2. Patio.com is one of the largest, independently owned retailers of outdoor furniture and game room furnishings in the country. In addition to its online store, Patio.com has fourteen store locations across seven

states. In New York, Patio.com has stores in Mount Kisco, Scarsdale, Southampton and Westbury.

3. Patio.com's origins predate the dot-com era. The company, which is owned by myself and my two brothers, was founded in 1984. As a high school student, I started a swimming pool service company with $50. Business grew quickly, and when my brother Phillip joined me we became the first pool service company in Connecticut to open a retail location. Shortly thereafter, a second retail store was opened in Greenwich on a site of over an acre. As Patio.com's retail business grew, my oldest brother Mitchell joined the company as the director of purchasing and merchandising for outdoor furniture. Over the past ten years, Patio.com has opened new stores almost every year—including its first Florida store in 2010.

4. Patio.com has been accepting credit cards since its inception. Over the years, credit cards have become an increasingly popular form of payment at our storefront locations. Currently, about 80% of our storefront sales are on credit cards. Patio.com typically pays between 2% and 3% of the transaction total in merchant discount fees (commonly known as "swipe fees") when a customer uses a credit card to make a purchase. If a customer pays using a debit card Patio.com loses much less on the sale. For cash and check sales, Patio.com pays no merchant discount fee.

5. Last year Patio.com paid over $200,000 in credit card-related merchant discount fees. These fees represent a significant operating expense for Patio.com. It has been a point of enormous frustration for Patio.com that, unlike other areas of the business, we have not been able to realize any cost efficiencies with respect to credit card processing as our charge volume on credit cards has grown. In contrast to costs such as rent and advertising,

which have decreased in proportion to our sales as Patio.com has grown, we have not experienced any of the same efficiencies with merchant discount fees. Despite adding a new store virtually every year for the past ten years and continually growing our charge volume, the effective cost for Patios.com to accept credit cards has increased—not decreased—over time.

6. One of our goals at Patio.com is to guarantee our customers competitive, low prices for the outdoor furniture and game room furnishings that we sell. Patio.com, however, must include the costs of accepting credit cards in the prices that we charge to all customers because the New York no-surcharge law effectively prohibits us from passing along those costs only to those customers who pay with credit cards. This means that our customers who pay with cash, check or debit cards pay more for their purchases than they otherwise would if we could pass along the costs of credit card acceptance directly to those customers who actually use credit cards. We believe that it is unfair to force cash-paying and debit-paying customers to pay higher prices for the benefit of credit card users, and unfair for merchants to bear the hidden transaction costs.

7. In order to better inform our customers about the financial impact of merchant discount fees, Patio.com would like to add a line item to the receipt that illustrates the payment processing costs that Patio.com incurs when customers pay with credit cards. Such a line item would inform customers that they are paying more for using a credit card, but we are afraid that such a line item would also be considered a "surcharge" under the New York no-surcharge statute. Given the criminal penalties associated with the New York no-surcharge law, Patio.com has steered well clear of bumping up against the law.

8. At various times, Patio.com has attempted to encourage customers to use their debit cards through verbal steering. Our store and phone clerks try to list debit cards first when asked which forms of payment are accepted and there have been attempts to communicate the high costs associated with accepting credit cards. These attempts have had very limited positive results, however, as they do not provide customers with an incentive (other than perhaps altruism) to use their debit cards. Accordingly, Patio.com would like to charge customers more for paying with a credit card and to state that there is no charge for paying with debit, cash or checks. We believe that being able to charge a different price for credit card usage—and to call that price a "surcharge"—would provide a meaningful incentive to many customers to switch to paying with a debit card, cash or check. For those customers who continue to pay with a credit card, the "surcharge" would allow us to defray some of the costs of credit cards acceptance. Between switching customers to less expensive forms of payment and collecting a surcharge for those who pay with a credit card, we believe that Patio.com could realize substantial cost savings that would, in turn, allow us to keep our prices down.

9. We understand that Patio.com could in effect charge credit-card customers more by labeling the price difference between credit and a different payment method as a "discount" for paying with cash, check, or a debit card rather than a "surcharge" for paying with credit. We do not, however, believe that labeling this difference as a "discount" is as effective as calling it a "surcharge" for using a credit card, and we feel that such discounting would only be marginally more effective than the verbal steering that we already attempt with our customers. If the same transaction is communicated to the consumer as a "surcharge" rather than a

"discount," customers will react very differently. Even though the transaction is the same, consumers are much more likely to switch to less expensive payment forms when faced with a "surcharge" as opposed to a "discount."

10. In addition, we are concerned about the difficulty in controlling the language our employees would use to express a discount. We understand that employees may tell customers that they will pay *less* if they don't use credit cards but not that they will pay *more* if they use credit cards. This distinction is difficult to understand and we are not confident that we could ensure that our employees would be able to constantly adhere to that distinction in practice. We are not willing to take that risk, especially in light of the fact that New York's no-surcharge law imposes criminal penalties on merchants who make the mistake of telling consumers that they are paying more for using credit cards.

I declare under penalty of perjury the foregoing is true and correct.

Dated: Stamford, Connecticut

May 28, 2013

s/ David Ross

David Ross

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF LINDA FIACCO

LINDA FIACCO hereby declares:

1. I am one of the three co-owners of Expressions Hair Design ("Expressions"), a unisex hair salon in Vestal, New York. Along with my partners, I am responsible for the day-to-day operations of the salon, including scheduling appointments, handling finances, and providing the full range of services to our customers—including hairstyling, hair texturing, hair coloring, waxing, and massage.

2. Expressions accepts Visa, MasterCard, and Discover credit cards, and has been accepting credit cards since we started the business in 2006.

3. When a customer uses a credit card to pay for services, we typically pay between 2.4% and 3.3% of the price in swipe fees. By contrast, we pay only 1.75% in swipe fees if a customer pays using a debit card. And we pay no swipe fees at all if a customer pays with cash or a check. For a small business like ours, these swipe fees make an enormous difference.

4. Vestal is a college town—home to Binghamton University, the flagship campus of the State University of New York. But even in this university community, we have found that most of our consumers are not aware of the high cost of credit-card swipe fees or the ways in which they burden small businesses like ours. When they learn about swipe fees, however, our customers are generally sympathetic and tend to agree with our perspective.

5. We want to do what we can to ensure that our customers are aware of the high cost of using credit cards, and that they take that information into account in deciding how to pay for a haircut or other services. Ultimately, like most small merchants, we want credit card companies to reduce their swipe fees. We are aware that this issue is a matter of significant political controversy and has been debated in the state legislatures and in Congress (which recently considered regulating swipe fees). If we can do our part to educate people about swipe fees, we are hopeful that they will act on that information—both as consumers and as citizens.

6. Until 2012, Expressions posted a sign at our counter informing all customers that, due to the high swipe fees charged by the credit-card industry, we would charge them 3% more for using a credit card to purchase

services. But we took down the sign and stopped informing customers of that policy when a customer of ours (who is also a lawyer) told us that New York law makes it illegal to impose a "surcharge" on customers for paying with a credit card (even though merchants are allowed to provide a "discount" for paying with something other than a credit card).

7. Because of the New York no-surcharge law, our current policy is to charge two different prices for haircuts and other services—a lower price for customers paying in cash and a higher price for customers paying with a credit card. We try to be as careful as we can to avoid characterizing that price difference as a "surcharge" or an "extra" charge for paying with a credit card, even though it is obvious that customers do effectively pay more for using a credit card whenever a store offers a "discount" for using cash.

8. We would like to clearly and transparently impose a surcharge on customers who pay for their haircuts with credit cards, but the New York law prevents us from doing so. We believe that being able to describe the price difference as a "surcharge" would be the most effective way of communicating to our customers that they are paying *more* for using a credit card (not just that they are paying *less* for using cash). Even though these are just two ways of describing the same thing, people will respond differently. We know from experience that customers who are presented with a extra charge for using a credit card are much more likely to respond by using a cheaper payment method. We hope that giving merchants like us the ability to transparently impose surcharges will make consumers better informed about the costs of credit and, ultimately, cause those costs to go down across the board.

9. We are also very concerned about how we are supposed to ensure our compliance with New York's no-surcharge law. As far as we can tell, we are allowed to tell customers that they are paying *less* if they use cash but cannot tell customers that they are paying *more* for using a credit card—even though customers *are* actually paying more for using a credit card. That distinction is hard to understand, and even harder to follow in practice. If a customer asks us whether we charge more for paying with a credit card, should we ignore or dodge the question? Are we required to answer falsely? Or should we say something like the following? "State law does not allow us to tell you that you are paying more for using a credit card, but we can tell you that you are paying less for not using a credit card."

Dated: Vestal, New York
May 31, 2013

s/ Linda Fiacco
Linda Fiacco

Consumer Federation of California
P.O. Box 27066, Los Feliz Station,
Los Angeles, California 90027

July 5, 1985

Legislative Advocate
Harry Snyder
1535 Mission Street
San Francisco, Calif. 94103
(415) 431-6747

Senator Bill Lockyer
State Capitol
Sacramento, CA 95814

Re: Opposition to S.B. 848 (Rosenthal)

Dear Senator Lockyer:

The Consumer Federation of California representing 150 organizations millions of California consumers, urges you to oppose S.B. 848 (Rosenthal) when it is heard by the Senate Judiciary Committee on July 9th.

A federal law which prohibited retailers from charging for credit card use expired in January and efforts to renew it were unsuccessful. S.B. 848 (Rosenthal) would enact a similar prohibition into California law.

Retailers are charged a fee for credit card receipts. Yet S.B. 848 (Rosenthal) would make it impossible for a retailer to directly pass these costs on to credit card users. Instead, the bill would mandate the continuation of an invisible subsidy where cash customers must share the costs associated with credit card use through higher retail prices. This system is particularly inequitable for

low income consumers since most of do not have credit cards.

We urge you to oppose this bill to allow the marketplace to operate more effectively.

Sincerely,

Harry M. Snyder
Legislative Advocate
Consumer Federation of California

cc: Senator Herschel Rosenthal
Roger Dickinson
Mary Solow

Consumers Union

July 5, 1985

Senator Bill Lockyer
State Capitol
Sacramento, CA 95814

Re: Opposition to S.B. 848 (Rosenthal)

Dear Senator Lockyer:

Consumers Union, nonprofit publishers of Consumer Reports magazine urges you to oppose S.B. 848 (Rosenthal) when it is heard by the Senate Judiciary Committee on July 9th. This bill would prohibit retailers from charging a fee to their credit card customers.

Retailers pay a fee for all credit card purchases. (The fee is usually a percentage of volume sales. Fees for bankcards range from 2–5% while fees for private cards are generally higher with companies such as American Express charging as much as 6%.) However, this bill would prohibit retailers from passing this cost on to their credit card customers. It would continue an invisible subsidy in the marketplace whereby cash customers subsidize credit card customers through higher retail prices. This system is particularly inequitable to low income consumers since most of them do not have credit cards. (Less than 25% of those making $20,000 or less have a Visa or Mastercard; only 3.2% of this group has an American Express card.)

Until this year federal law prohibited retailers from charging a fee to their credit card customers. That federal law expired in 1984 and efforts to renew it failed. Now the credit card companies are trying to pass a

similar prohibition in the California legislature with S.B. 848 (Rosenthal).

We urge you to oppose this bill so that all consumers will not have to continue to subsidize those who chose to pay for their purchases with a credit card.

Sincerely,

Harry M. Snyder, Director
West Coast Regional Office
Consumers Union of the U.S., Inc.

cc: Senator Herschel Rosenthal

Chapter 160
Laws of 1984

Senate Bill 8367 Assembly Bill

SENATE – ASSEMBLY
March 14, 1984

IN SENATE – Introduced by Sens. LACK, CALANDRA, DALY, FLYNN, JOHNSON, KNORR, LAVALLE, LEVY, MARINO, SHERMERHORN, TRUNZO, TULLY, VOLKER – read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

IN ASSEMBLY – Introduced by M. of A. GOLDSTEIN, WERTZ – read once and referred to the Committee on Consumer Affairs and Protection

AN ACT to amend the general business law, in relation to prohibiting the imposition of a surcharge on persons purchasing goods or services using a credit card

IN THE AS EMBLY BY: Goldstein, Wertz
A-10189

Bill compared by:

DATE RECEIVED BY GOVERNOR :
5/24
ACTION MUST BE TAKEN BY:
6/5
GOVERNOR'S ACTION:
DATE: 6/5/84

SENATE VOTE 52 Y 7 N

Date 5/8/84

ASSEMBLY VOTE 147 Y 0 N

Date 5/21/84

1984 SENATE JOURNAL
MAY 8 – 1984
PAGE 65

SENATE

The Senate Bill Senate No. 8367

by Mr. Lack Calendar No. 717 Assem. Rept. No.

Entitled:

8367 LACK

An act to amend the general business law, in relation to prohibiting the imposition of a surcharge on persons purchasing goods or services using a credit card

was read the third time

The President put the question whether the Senate would agree to the final passage of said bill, the same having been printed and upon the desks of the members in its final form at least three calendar legislative days, and it was decided in the affirmative, a majority of all the Senators elected voting in favor thereof and three-fifths being present, as follows:

AYE	Dist		NAY
	51	Mr. Anderson	
	48	Mr. Auer	
	17	*Mr. Babbush*	
	46	Mr. Barclay	
	20	*Mr. Bartosiewicz*	
	9	*Mrs. Berman*	
	33	*Mr. Bernstein*	

	29	*Mr. Bogues*	
	43	Mr. Bruno	
	34	Mr. Calandra	
	25	*Mr. Connor*	
	40	Mr. Cook	
	61	Mr. Daly	
	47	Mr. Donovan	
	6	Mr. Dunne	
	44	Mr. Farley	——
	60	Mr. Floss	——
	35	Mr. Flynn	
	31	*Mr. Galiber*	
	13	*Mr. Gold*	
	37	Mrs. Goodhue	
	26	Mr. Goodman	
	18	Mr. Halperin	
	22	*Ms. Jefferson*	
	10	*Mr. Jenkins*	——
	4	Mr. Johnson	
	53	Mr. Kehoe	——
	15	Mr. Knorr	
	2	Mr. Lack	
	1	Mr. LaValle	
	28	*Mr. Leichter*	EXCUSED
	8	Mr. Levy	
	49	Mr. Lombardi	
	24	Mr. Marchi	

	5	Mr. Marino	
	21	*Mr. Markowitz*	
	58	*Mr. Masiello*	
	30	*Mrs. Mendez*	
	23	*Mr. Montalto*	
	42	*Mr. Nolan*	
	27	*Mr. Ohrenstein*	
	14	*Mr. Onorato*	
	11	Mr. Padavan	
	54	*Mr. Perry*	——
	36	Mr. Pisani	EXCUSED
	56	Mr. Present	
	50	Mr. Riford	
	41	Mr. Rolison	
	32	*Mr. Ruiz*	
	39	Mr. Schermerhorn	
	52	Mr. Smith	
	19	*Mr. Solomon*	
	57	*Mr. Stachowski*	
	45	Mr. Stafford	
	12	*Mr. Stavisky*	
	55	Mr. Steinfeldt	
	3	Mr. Trunzo	
	7	Mr. Tully	
	59	Mr. Volker	
	16	*Mr. Weinstein*	
	38	*Mrs. Winikow*	

AYES 52
NAYS 7

Ordered, that the Secretary deliver said bill to the Assembly and request its concurrence therein.

S-8367

NEW YORK STATE ASSEMBLY A-10189

REPRINT NO: 001 DATE: 05/21/1984

DATE: 05/21/84 TIME: 03:37:07 P

BILL: S8367(A10189) R.R. NO. 195 SPONSOR:LACK

AN ACT TO AMEND THE GENERAL BUSINESS LAW, IN RELATION TO PROMIBITING THE IMPOSITION OF A SURCHARGE ON PERSONS PURCHASING GOODS OR SERVICES USING A CREDIT CARD

Y	ABRAMSON, E.
Y	BARBARO, FJ
Y	Barnett, HW
Y	Barraga, TF
Y	Becker, GR
Y	Behan, JL
Y	BENNETT, LE
Y	BIANCHI, IW
Y	BOYLAND, WF
Y	BRAGMAN, MJ
Y	BRODSKY, RL
Y	Burrows, GW
Y	Bush, WE
Y	BUTLER, DJ

Y	Casale, AJ
Y	CATAPANO, TF
Y	Chesbro, RT
Y	Cochrone, JC
Y	CONNELLY, EA
Y	CONNERS, RJ
Y	CONNOR, RJ
Y	Cooke, AT
Y	Coombe, RI
Y	DAmato, AP
Y	DAndrea, RA
Y	DANIELS, GL
Y	DAVIS, G
Y	DEARIE, JC
Y	DEL TORO, A
Y	DIAZ, HL
Y	DUANE, JF
Y	DUGAN, EC
Y	ENGEL, EL
Y	EVE, AO
Y	FARRELL, HD
Y	FELDMAN, D
Y	FERRIS, J
Y	Flanagan, JJ
Y	FREDA, L
Y	FRIEDMAN, G
Y	GANTT, DF

Y	GOLDSTEIN, R
Y	GORSKI, DT
Y	GOTTFRIED, RN
Y	GRABER, VJ
Y	GRANNIS, A
EOR	GREEN, RL
Y	GREENE, A
Y	GRIFFITH, E
Y	HALPIN, PG
Y	Hannon, K
Y	HARENBERG, PE
Y	Harris, GH
Y	HARRISON, J
Y	Hawley, RS
Y	Healey, PB
Y	HEVESI, AG
Y	HIKIND, D
Y	HINCHEY, MD
Y	Hoblock, MJ
ABS	HOCHBRUECKNER, GJ
Y	HOYT, WB
Y	JACOBS, RS
Y	JENKINS, C
Y	KEANE, RJ
Y	Kelleher, NW
Y	KOPPELL, GO
Y	KREMER, AJ

Y	Kuhl, JR
Y	LAFAYETTE, IC
Y	Lane, CD
Y	Larkin, WJ
Y	LASHER, WL
Y	Leibell, VL
Y	LENTOL, JR
Y	Levy, E
Y	LIPSCHUTZ, GE
Y	MacNeil, HS
Y	Madison, GH
Y	MARCHISELLI, VA
Y	MARSHALL, HM
Y	MAYERSOHN, N
Y	MCCABE, JW
Y	McCann, JW
Y	MCNULTY, MR
Y	MCPHILLIPS, MM
Y	Miller, HM
Y	MILLER, MH
Y	MUPRHY, MJ
Y	MURTAUGH, JB
Y	NADLER, J
Y	Nagle, JF
Y	NEWBURGER, MW
Y	NORMAN, C
Y	Nortz, HR

Y	Nozzolio, MF
Y	ONeil, JG
Y	ORAZIO, AF
Y	PARMENT, WL
Y	Parola, FE
Y	PASSANANTE, WF
Y	PATTOn, BA
Y	Paxon, LW
Y	Parone, JM
Y	Pillittere, JT
Y	PORDUM, FJ
Y	PROUD, G
Y	Rappleyea, CD
Y	Rettaliata, AP
Y	RIVERA, J
Y	ROBACH, RJ
Y	ROBLES, VL
Y	RUGGIERO, RS
Y	Ryan, AW
Y	RYAN, WJ
Y	Saland, SM
Y	SANDERS, S
Y	Sawicki, J
Y	SCHIMMINGER, RL
Y	SCHMIDT, FD
Y	Sears, WR
Y	SEMINERIO, AS

Y	SERRANO, JE
Y	Sheffer, JB
Y	SIEGEL, MA
Y	SILVER, S
Y	SLAUGHTER, LM
Y	Spano, NA
Y	Straniere, RA
Y	SULLIVAN, EC
Y	Sullivan, PM
Y	TALLON, JR
Y	Talomie, FG
Y	Tedisco, J
Y	TONKO, PD
Y	VANN, A
Y	VITALIANO, EN
Y	WALDON, AR
Y	WALSH, DB
Y	Warren, GE
Y	WEINSTEN, WE
Y	WEPRIN, S
Y	Wertz, RC
Y	Wesley, RC
Y	WILSON, CE
Y	Winner, GH
Y	YEVOLI, LJ
Y	YOUNG, GP
Y	ZIMMER, MN

MR. SPEAKER

YEAS: 147 NAYS: 0

ONTROL: 20638082 CERTIFICATION:_____

LEGEND: Y=YES, NAY=NO, NV=ABSTAIN,
ABS=ABSENT,

ELB=EXCUSED FOR LEGISLATIVE BUSINESS,
EOR=EXCUSED FOR OTHER REASONS.

MEMORANDUM

Senate Bill — Introduced by Senator James J. Lack

Assembly Bill 10189 — Introduced by Assy. Ralph Goldstein

AN ACT to amend the general business law, in relation to prohibiting the imposition of a surcharge on persons purchasing goods or services using a credit card

SUMMARY:

This bill would enjoin any merchant from levying a surcharge on sales or services charged to a credit card.

The bill would provide that any merchant who breaches the provisions of this bill would be guilty of a misdemeanor, liable for a fine of not more than $500, or one year in prison, or both.

A merchant would be able to offer a discount for cash if they so desire. The only procedure that would be prohibited is a surcharge for credit in keeping with the provisions of the Federal ban that recently expired.

JUSTIFICATION:

The expiration of a Federal ban on surcharges on credit card purchases places credit card users at an unfair disadvantage. While merchants are permitted to offer cash discounts, they would attempt to offset the 3% fee charged (to them) by banks or card corporations for

credit services by increasing the price of a good or service purchased on a credit card.

In effect, two price scales would exist for the merchant who would advertise a certain price and, at the time of the sale, raise or lower the price according to the method of payment. Consequently, the consumer would be subject to dubious marketing practices and variable purchase prices.

FISCAL IMPLICATIONS:

None

EFFECTIVE DATE:

Immediately upon enactment

717

MEMORANDUM

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In effect, two price scales would exist for the merchant who would advertise a certain price and, at the time of the sale, raise or lower the price according to the method of payment. Consequently, the consumer would be subject to dubious marketing practices and variable purchase prices.

FISCAL IMPLICATIONS:

None

EFFECTIVE DATE:

Immediately upon enactment

THE SENATE
STATE OF NEW YORK
ALBANY 12247

May 29, 1984

TO: The Hon. Gerald C. Crotty
FROM: Senator James J. Lack
RE: Senate Bill 8367

Thank you for giving me the opportunity to write to you in favor of the above bill which would amend the General Business Law by adding a new section which would prohibit merchants and vendors from adding a "surcharge" to purchases made with a credit card.

Until February 28, of this year, there was in place by Federal law, a restriction on merchants and other commercial vendors from imposing any surcharge on consumers who paid for goods or services by way of a credit card, in lieu of payments by cash, check or similar direct remittance. This Federal legislation has lapsed and it does not appear imminent that the separate houses of Congress will be able to agree upon a unified resolution of the "surcharge" ban that has been in place for so many years.

The consumers of New York State must not be required to forego this essential protection in the market place because Congress cannot agree on whether the ban should be permanent or temporary, or otherwise resolve the somewhat technical points which appear to be hindering the passage of this worthwhile protection for the entire nation.

I urge the Governor, on behalf of all of the consumers of New York State, to sign the proposed legislation into law. A very successful and balanaced effort has been pursued in New York to protect the rights of consumers and yet allow the merchants and commerical enterprises

in New York State to prosper with a minimum of direct government regulation. This bill would continue that careful balance.

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

May 30, 1984

Hon. Gerald C. Crotty
Executive Chamber
State Capitol
Albany, NY 12224

Dear Mr. Crotty

The attached legislation (A.10189, S.8367) prohibits sellers from placing any surcharge on a consumer who pays by credit card rather than cash or check. A "surcharge" here is understood to mean any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check or a similar means. This is identical to the definition contained in § 103 (q) of the federal Truth-in-Lending Act.

Since the February 27th expiration of the federal ban on such surcharges, five states have acted to continue to prohibit credit surcharges, and Connecticut and Pennsylvania are expected to soon follow. It is important that New York do so as well. Credit cards are a way of life in our country; New Yorkers have become accustomed to their use, and to allow imposition of a surcharge now will only result in a windfall for some retailers with no concomittant benefit for consumers.

It is important to note that this bill does nothing to prevent a seller from offering a discount to consumers who pay by cash or check. This was always permitted under truth-in-lending and continues to be allowed under the proposed bill.

I urge you to recommend that the Governor approve this legislation.

Sincerely yours,

RALPH GOLDSTEIN
Member of Assembly

Memorandum

New York State Police

June 6, 1984

SENATE	ASSEMBLY	INTRODUCED BY
8367		Sens. Lack, Calandra, Daly, Flynn, Johnson, Knorr, Lavalle, Levy, Marino, Schermerhorn, Trunzo, Tully, Volker

RECOMMENDATION: APPROVAL

STATUTE INVOLVED: GENERAL BUSINESS LAW

EFFECTIVE DATE: IMMEDIATELY

PURPOSE:

This bill amends the General Business Law by adding a new Section 518. This section would prohibit sellers in any sales transaction from imposing a surcharge for the use of a credit card. Violation of this provision is a misdemeanor and subjects violators to a fine not to exceed $500.00 and/or a term of imprisonment not to exceed one year. The Division of State Police recommends approval of this legislation.

Donald O. Chesworth
Superintendent

cc: Lawrence T. Kurlander
Director of Criminal Justice
Executive Chamber
State Capitol
Albany, NY 12224

Memorandum

June 1, 1984

To: Gerald C. Crotty
Counsel to Governor

From: Mollie Lampi, Associate Counsel
State Consumer Protection Board

Re: S.8367 (Lack)/A.10189 (Goldstein)

__X__ The Consumer Protection Board supports this bill.
_____ The Consumer Protection Board has no position on this bill.
_____ The Consumer Protection Board opposes this bill.

Comments:

The Consumer Protection Board supports S.8367/A.10189 to permanently ban credit card surcharges. Credit card surcharges were illegal until very recently when the federal prohibition on their use expired. As of this date, no new federal ban has been enacted. Merchants, however, may continue to offer discounts to those customers purchasing in cash.

Surcharges, even if only psychologically, impose penalties on purchasers and may actually dampen retail sales. A cash discount, on the other hand, operates as an incentive and encourages desired behavior.

One of the most important efforts of the consumer movement has been to insure that customers can depend on advertised claims and prices. Allowing credit card surcharges may defeat this effort however, by permitting unannounced price increases at the point of sale.

For these reasons, the Consumer Protection Board recommends approval of this bill.

MEMORANDUM

May 25, 1984

STATE OF NEW YORK
DIVISION OF CRIMINAL JUSTICE SERVICES

TO: Matthew Crosson
FROM: Jay M. Cohen
SUBJECT: A. 2611, A. 5314C, A. 8029 & A. 10189/S. 8367

We have no comments on the subject bills.

js

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
ALBANY, NEW YORK
12236

EDWARD V. REGAN
STATE COMPTROLLER

May 23, 1984

The Honorable Gerald C. Crotty
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Dear Mr. Crotty:

Thank you for requesting our comments regarding the bills listed below. Since these bills are not within an area of direct responsibility or interest of the Office of the State Comptroller we will offer no opinion in relation to their enactment.

	Senate	Assembly
	6705-C	4525-A
	7417	10310
	8193-A	
X	8367	
	8398	
	8531	

Very truly Yours,
John F. Black
Assistant Counsel

STATE OF NEW YORK
DEPARTMENT OF COMMERCE
ONE COMMERCE PLAZA
ALBANY, NEW YORK 12245

TEN-DAY BILL MEMORANDUM
June 4, 1984

TO: Gerald C. Crotty
Counsel to the Governor

FROM: Thea Hoeth, First Assistant Counsel
Department of Commerce

SUBJECT: S. 8367 (Lack, et al.)

RECOMMENDATION: No Objection

The Department of Commerce has no objection to this bill, which would amend the General Business Law to prohibit sellers from imposing a surcharge on sales charged to a credit card. Violations would be punishable by a fine of $500 and/or one year in prison.

This bill was proposed to maintain the status quo while extension of the Federal surcharge ban, which expired in February, is debated by Congress. In the absence of State or Federal action, merchants may increase the cost of goods paid for by credit card although the Department suspects the pressures of the marketplace would discourage such practice. Finally, the Department understands that the Retail Council of New York State is not opposing the measure.

T.H.

TO COUNSEL TO THE GOVERNOR

RE: SENATE 8367
ASSEMBLY

Inasmuch as this bill does not appear to relate to the functions of the Department of Law, I am not commenting thereon, at this time. However, if there is a particular aspect of the bill upon which you wish comment, please advise me.

ROBERT ABRAMS
Attorney General

Dated: 5-24-84

NYCOM

May 23, 1984

Hon. Gerald C. Crotty, Counsel
Executive Chamber
State Capitol
Albany, NY 12224

R: S. 8367

Dear Mr. Crotty:

The Conference of Mayors writes this memorandum at your request. We wish to advise the Governor that we do not believe that the subject matter of this bill relates to the operation of local government. Hence, we will make no recommendation relating to this bill.

Sincerely,

DONALD A. WALSH
General Counsel

New York State Conference of Mayors and Other Municipal Officials

RETAIL COUNCIL OF NEW YORK STATE

May 25, 1984

MEMORANDUM

S. 8367 (Lack et al.) – Senate Consumer Protection Committee

A. 10189 (Goldstein, Wertz) – Assembly Consumer Affairs and Protection Committee

AN ACT to amend the general business law, in relation to prohibiting the imposition of a surcharge on persons purchasing goods or services using a credit card.

This bill would prohibit any merchant from imposing a surcharge on sales or services charged to a credit card, regardless of the cost the merchant must absorb to process that credit transaction.

A merchant must pay a percentage of each credit sale to the credit card company, and, as a rule, this business expense is recovered through the retail price on all merchandise for sale. In essence, cash customers and those who cannot qualify for credit cards are subsidizing credit customers since everyone must pay more to cover the inherent costs of processing credit transactions. Without the option of imposing a surcharge on credit purchases, a merchant has no choice but to raise the price of all goods accordingly, or face the prospect of going out of business.

We feel if merchants are allowed to recover their credit costs directly through a surcharge, the level of competition between retailers could be heightened,

resulting in a variety of new credit terms and options for discriminating shoppers. If a surcharge on credit sales is authorized, some merchants would then have the latitude to consider such attractive consumer options as lower interest rates on proprietary (store) credit cards, or reduced retail prices on all goods.

Federal legislation to authorize surcharges on credit card purchases is being supported by the Consumer Federation of America, Consumers Union, Federal Reserve Board and the Federal Trade Commission. The Retail Council adds its support, emphasizing that this issue should be resolved on the federal, not the state, level.

Respectfully submitted,

James A. Quaremba, President and
Chief Executive Officer

Peter H. Zimmerman, Vice President
and Director of Governmental Affairs

New York State Association of Counties
150 STATE STREET ALBANY, NEW YORK 12207

May 29, 1984

Honorable Gerald Crotty
Counsel to the Governor
The Executive Chamber
The Capitol
Albany, NY 12224

RE: S. 8367/A/10189

Dear Gerry:

This letter is in response to your recent inquiry concerning the above-mentioned legislation recently passed both houses of the Legislature and now before the Governor for executive action.

The New York State Association of Counties has no position on this legislation.

Please call on our office if we can be of any further assistance.

Yours very truly,

Edwin L. Crawford
Executive Director

Attorney General Cuomo's Investigation Prompts 14 Suffolk County-based Home Heating Oil/propane Companies To Agree To Stop Charging Surcharges For Credit Card Purchases

HAUPPAUGE, N.Y. (September 14, 2009) -Attorney General Andrew M. Cuomo today announced that his office has reached settlements with 14 Suffolk County-based home heating oil companies for improperly adding surcharges for credit card payments.

The agreements with Avalon Fuel Corporation, Ben Oil Company, Inc., Blue Collar Fuel, Inc., Comfort Fuel, Inc., Discount Oil, Inc., K Skee Fuel Oil Corp., NAPCO Oil Heat Corporation, Nordica Fuel Corp., Oil King of Long Island, Parkside Fuel, Inc., Pazienza Bay Carting and Fuel Company, Inc., Rocky & Marciano Fuel Oil, Inc., Southville Petroleum Corporation and Taylor Fuel, Inc. end the practice of adding surcharges for credit card payments and provide refunds to more than 2,000 affected consumers and pay penalties and costs to the state.

"As winter approaches, families across the state start looking for the best and most affordable way to keep their homes warm," said Attorney General Cuomo. "This already massive expense should not be compounded by hidden costs and charges that place an even greater burden on New York homeowners. Today's agreement will provide welcome relief to thousands of Long Islanders who suffered from these companies' misleading and deceptive business practices."

Under New York State General Business Law section 518, no seller may impose a surcharge for customers who elect to pay via credit card in lieu of payment by cash, check or similar means. After receiving complaints from local consumers, the Attorney General's Office conducted an immediate investigation

into Suffolk County-based companies that were routinely charging illegal surcharges. As part of the agreements, the companies have agreed to immediately stop charging such fees:

- Manorville-based Avalon Fuel Corporation must provide refunds to an estimated 200 customers and pay $4,000 in penalties, fees and costs to the state.
- Lindenhurst-based Ben Oil Company, Inc., must provide refunds to approximately 40 of its credit card-using customers.
- Shoreham-based Blue Collar Fuel, Inc. must pay refunds to 600 customers.
- Greenlawn-based Comfort Fuel, Inc. must pay refunds to 30 customers.
- Huntington-based Discount Oil, Inc. must provide refunds to 50 customers.
- Centereach-based K Skee Fuel Oil Corp. must refund 150 customers and pay a $1,000 fine to the state.
- Lindenhurst-based NAPCO Oil Heat Corporation must provide refunds to 200 customers and pay $3,000 in penalties, fees and costs to the state.
- Ronkonkoma-based Nordica Fuel Corp. must pay refunds to 70 customers.
- Oil King of Long Island, based in Bay Shore, must pay refunds to 40 customers.
- Parkside Fuel, Inc., of Mount Sinai, must provide refunds to 50 customers.
- Holtsville-based Pazienza Bay Carting and Fuel Company, Inc., must give refunds to 150 customers and pay $1,000 in penalties, fees and costs to the state.
- Holtsville-based Rocky & Marciano Fuel Oil, Inc. must provide refunds to 400 customers and pay $4,000 in penalties, fees and costs to the state.

- East Northport-based Southville Petroleum Corporation must pay refunds to 55 customers, plus $1,000 in penalties, fees and costs to the state.
- Ronkonkoma-based Taylor Fuel Company must pay refunds to approximately 20 customers.

Consumers who believe they have been subjected to fraud or deceptive practices are urged to contact the Attorney General's Suffolk Regional Office at 631-231-2401. More information can be found online at www.ag.ny.gov.

The cases were handled by Acting Assistant Attorney General-in-Charge of the Suffolk Regional Office Alan Berkowitz.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

SUPPLEMENTAL DECLARATION OF STEPHEN MILLES

STEPHEN MILLES hereby declares:

As I explained in my previous declaration, Five Points Academy would like to impose an extra charge, or "surcharge," if a member pays by credit card instead of cash, check, or debit card. We would display prominently the surcharge that the customer will incur for using a credit card. It is not our intention to display two separate prices for each good and service that we offer, but rather

to display—with roughly equal prominence—a single set of prices and the credit card surcharge amount.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at New York, New York on July 28, 2013

s/ Stephen Milles

Stephen Milles

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

SUPPLEMENTAL DECLARATION OF LINDA FIACCO

I, Linda Fiacco, hereby declare:

As I explained in my previous declaration, Expressions Hair Design used to post a sign prominently informing all of our customers that, due to the high swipe fees charged by the credit-card industry, we would charge them 3% more for using a credit card. But we were forced to take down the sign in 2012 when we learned of New York's no-surcharge law. To be perfectly clear: We would like to be able to put our sign

back up and, as we did before, characterize the price difference as a 3% credit-card surcharge on top of the listed cash price. As before, our sign would list with equal prominence both the cash price and the additional credit-card charge—expressed as a percentage—without also displaying the total credit-card price as a dollar figure. The only reason we have not put our sign back up is that we are afraid we would be found in violation of New York's no-surcharge law.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Vestal, New York
July 26, 2013

s/ Linda Fiacco
Linda Fiacco

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF MICHAEL PARISI

Michael Parisi declares as follows:

1. I am the owner of Parkside Fuel Oil Delivery & Service, a family-owned-and-operated heating-and-cooling company in Mount Sinai, New York. I am responsible for Parkside's day-to-day operations, which include the sale, installation, and servicing of home boilers, oil tanks, water heaters, and air-conditioning units.

2. Parkside has been in business since 2001 and has steadily grown through excellent service and customer

loyalty. We pride ourselves on providing prompt deliveries and expert service, and the satisfaction of our customers has been our primary goal since day one.

3. Parkside allows customers to pay with a credit card. When a customer uses a credit card to make a purchase, we pay between 2% and 3% of the price in swipe fees. For a small business like ours, these fees make an enormous difference.

4. Several years ago, we decided to start imposing a small surcharge on credit-card purchases to help recover some of the cost of accepting credit cards. We did this because we did not want to raise our prices to make all customers pay these costs, which we thought was unfair to those who paid in cash.

5. We notified our customers of this surcharge on the phone, at the same time that we informed them of our prices, before they made a purchase. We would tell them the price of fuel (for example, $3.45/gallon) and then explain that there was a surcharge on top of that price for paying with a credit card (for example, $.05/gallon). Every customer who paid a surcharge was therefore made aware of the charge before doing so, meaning that each one could have made a decision to use cash to avoid paying the charge.

6. In 2009, the New York Attorney General's Office called our business pretending to be a customer ordering oil. We quoted the price of oil and said that we charge a fee on top of that price for using a credit card. The Attorney General took the position that we were imposing a credit-card "surcharge" in violation of General Business Law § 518.

7. Because we did not want any trouble, and because we are not lawyers and have no legal training, we did not contest the charges, and instead complied with the Attorney General's demand that we stop imposing

surcharges on credit-card purchases and also provide credits to customers who had paid surcharges from September 2008 to May 2009. The Assurance of Discontinuance that I signed is attached to this declaration.

8. In a telephone conversation with a lawyer named Alan Berkowitz from the Attorney General's Office, I asked how I could lawfully pass on the cost of credit to customers under the No-Surcharge Law. He told me that I could do so by characterizing the difference between paying with cash and paying with credit as a cash "discount," not a credit "surcharge," and then gave me a script of what I could tell customers when talking to them over the phone. He said that I could quote the price as $3.50/gallon, for example, and then explain to customers that they would receive a $.05/gallon "discount" for paying with cash, but that I could not quote the price as $3.45/gallon while explaining that they would have to pay a $.05/gallon "surcharge" to use a credit card.

9. For a little while, we tried doing what he had said. We offered "discounts" to those who paid in cash. But our customers found that to be very confusing, and it made us look unscrupulous because Suffolk County charges a sales tax of 2.5% on home heating fuel (which is similar to the amount of the cash discount that we offered), and some customers mistakenly thought that we would not pay the tax if they paid in cash, which is not the message that we meant to convey. As a result, we stopped offering discounts and now charge only one price to all of our customers regardless of whether they use cash or credit.

10. We have been told that the Attorney General is now claiming that the state's No-Surcharge Law is just a false-advertising law. That does not square with our

experience. The Attorney General's Office never told us that we could impose a surcharge on our credit-card-paying customers if only we disclosed the charge to them ahead of time. In fact, the Assurance of Discontinuance clearly says that we "shall not charge consumers a surcharge for payment by credit card," period, regardless of how it is disclosed.

11. Based on our experience, New York's No-Surcharge Law is all about semantics. The Attorney General always told us that we could not say that we charge more for using a credit card, but that we could say that we charge less for using cash. We were targeted because we didn't realize that we had to tell our customers about the price difference between cash and credit in a specific way.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Mount Sinai, New York
July 23, 2013

s/ Michael Parisi
Michael Parisi

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

June 29, 2009

Parkside Fuel, Inc.
1054 Route 25A
Mt. Sinai, New York 11766

To Whom It May Concern:

Attached please find the Assurance of Discontinuance that you have entered into with the Attorney General.

Very truly yours,

ALAN B. BERKOWITZ
Assistant Attorney General

ABB/lm

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

----------X

In the Matter of AOD# 09-105
PARKSIDE FUEL, INC.

----------X

ASSURANCE OF DISCONTINUANCE PURSUANT TO EXECUTIVE LAW § 63(15)

Pursuant to the provisions of Article 22-A of the General Business Law and §63(12) of the Executive Law, ANDREW M. CUOMO, Attorney General of the State of New York caused an inquiry to be made into the business practices of PARKSIDE FUEL, INC. ("PARKSIDE"), and based upon that inquiry makes the following findings:

FINDINGS

1. PARKSIDE is a New York corporation located at 1054 Route 25A, Mt. Sinai, NY, 11766. PARKSIDE is engaged in the business of providing home heating oil and services in the State of New York.

2. PARKSIDE has been providing home heating oil and services for a number of years.

3. In conducting its home heating business, PARKSIDE uses various types of contracts. The Attorney General's inquiry relates to the home heating oil delivery for the 2008-2009 season. In setting its price for fuel oil, PARKSIDE regularly imposed a surcharge on consumers who chose to use a credit card as opposed to paying by cash or check.

4. Under General Business Law §518, no seller in any sales transaction may impose a surcharge on a purchaser who elects to use a credit card in lieu of payment by cash, check, or similar means. An

investigation by the Office of the Attorney General reveals that consumers were regularly and routinely charged these illegal surcharges by PARKSIDE.

5. By reason of the foregoing, the Attorney General asserts that PARKSIDE has engaged in conduct which violates General Business Law §518.

ASSURANCE

6. IT NOW APPEARS that PARKSIDE desires to settle and resolve the investigation. Accordingly, the Attorney General and PARKSIDE hereby enter into this Assurance of Discontinuance.

7. IT IS HEREBY UNDERSTOOD AND AGREED by PARKSIDE, its officers, directors, agents, employees and assignees, and any individual or entity through which PARKSIDE may now or hereafter act, as follows:

8. PARKSIDE shall not enforce provisions of any contract or any contract that includes a credit card surcharge in violation of General Business Law §518. Furthermore, PARKSIDE shall not charge consumers a surcharge for payment by credit card.

9. Subsequent to its initial meeting with the Office of the Attorney General, PARKSIDE ceased imposing a credit card surcharge on its customers, and has agreed to provide a refund to its customers of all previously imposed surcharges for the period of September 2008 to present within thirty days of the execution of this assurance. These refunds will be made as a credit to the customers' home heating oil account and documentation of these refunds has been provided to the Office o f the Attorney General.

10. PARKSIDE shall maintain, and upon request, make available to the Office of the Attorney General, for one year after the execution of this Assurance, copies of

all contracts that will demonstrate compliance with the requirements of this Assurance.

11. This Assurance concludes the investigation, and precludes any action that the Office of the Attorney General could commence against PARKSIDE and its affiliates for the acts, omissions and practices which are stated in this Assurance, except nothing contained herein precludes the Office of the Attorney General from bringing an action and/or proceeding to enforce PARKSIDE's obligations arising out of or relating to this Assurance.

COMPLIANCE REPORT TO THE ATTORNEY GENERAL

12. IT IS FURTHER AGREED that PARKSIDE shall file with the Office of the Attorney General, no later than sixty days after executing this Assurance, an affidavit, sworn to by a knowledgeable employee of PARKSIDE, attesting that all required refunds have been made and demonstrating that it is in full compliance with the terms of this Assurance.

MISCELLANEOUS

13. Nothing contained herein shall be construed so as to deprive any person of any private right under the law.

14. Pursuant to Executive Law §63(15), evidence of a violation of this of Discontinuance shall constitute *prima facie* proof of a violation of the applicable statutes in any civil proceeding thereafter commenced by the Attorney General.

WHEREFORE, the following signatures affixed hereto this 25 day of June, 2009.

PARKSIDE FUEL, INC.

By: Mike Parisi

President

CONSENTED TO:

ANDREW M. CUOMO
Attorney General of the State of New York

By: Alan B. Berkowitz
Assistant Attorney General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF DONNA ZASOWSKI

Donna Zasowski declares as follows:

1. I am the former owner of K Skee Fuel Oil, a heating-oil company in Centereach, New York. K Skee sold and delivered fuel oil products for residential use.

2. While I was owner, K Skee allowed customers to make purchases using a credit card. Because we incurred a fee whenever a customer paid with a credit card, we began imposing a small charge on those who used credit. We were up front with our customers about this charge, telling them about it over the phone when

informing them of our prices. For example, if someone called asking about the price of oil, we would tell them that it is $2/gallon, plus an additional $.05/gallon fee if paying with credit. We would say that "it's a nickel extra to use a credit card," and they would say "that's fine."

3. In 2009, the New York Attorney General's Office contacted us about our credit-card-fee policy. Assistant Attorney General Alan Berkowitz sent a letter informing us that the fee we were imposing was an unlawful surcharge under New York's No-Surcharge Law (General Business Law § 518).

4. When I spoke with Mr. Berkowitz over the phone, he told me: "You can charge more for a credit card all you want, but you have to say that this is the cash discount rate." He said that we had to tell customers that the regular price is $4.25/gallon, for example, and the cash discount rate is $4/gallon. But we had been saying that "it is a quarter more a gallon" to use a credit card, and we were not allowed to say that.

5. Mr. Berkowitz also told me that we had to provide restitution to our customers who had paid the surcharge even though we told them what we were doing.

6. I did not contest the charges or hire a lawyer because I thought I could not fight the Attorney General. I agreed to stop imposing a surcharge on customers who paid with a credit card. I also agreed to pay a $1,100 fine and restitution to customers who had paid the surcharge.

7. I have been informed that the Attorney General is now claiming that the No-Surcharge Law prohibits only hidden surcharges, and not surcharges that are prominently disclosed to customers before making a purchase. That is not what Mr. Berkowitz told me. He said that I could not impose a "surcharge" at all, but that I could give a cash "discount." He never said anything about being able to impose a surcharge if only I disclosed

that fact to customers, which is what I had been doing before the Attorney General contacted us.

I declare under penalty o f perjury that the foregoing is true and correct.

Dated: Centereach, New York
July 24, 2013

s/ Donna Zasowski
Donna Zasowski

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF KEVIN ROONEY

I, Kevin Rooney, do declare as follows:

1. For the past 31 years I have served as the Chief Executive Officer of the Oil Heat Institute of Long Island (OHILI). Incorporated in 1954, OHILI is a not-for-profit trade association which represents the interests of the Long Island heating-oil industry and the consuming public. The members of OHILI are located throughout Nassau and Suffolk Counties, and are mostly small, family-owned companies who have been in business for generations. We are dedicated to improving

our industry, our member companies, and the safety and welfare of the public we serve.

2. In 2009, then New York Attorney General Andrew Cuomo investigated and reached settlements with a number of Suffolk-County-based home heating-oil companies, including some members of OHILI. The Attorney General took the position that these companies had violated the state's No-Surcharge Law (General Business Law § 518), which prohibits merchants from imposing surcharges on consumers who choose to pay with a credit card instead of cash, because the companies charged a separate fee to any customer who made a purchase using a credit card. Had the companies characterized the price difference between using cash and credit as a cash "discount," however, and not a credit "surcharge," they would not have been in violation of the No-Surcharge Law. As part of the settlements, the companies agreed to stop imposing "a surcharge for payment by credit card." And the Attorney General required them to make refunds and, in some cases, pay fees and costs to the state.

3. Based on that experience, and the manner in which then Attorney General Cuomo enforced the No-Surcharge Law against our members, it is our understanding that the law turns on a semantic distinction in how a company characterizes the added cost of using a credit card. If the company calls it a credit "surcharge," the Attorney General can bring an enforcement action against them for violating the law, as it did against some of OHILI's members. If the company calls it a cash "discount," however, no action against the company is taken. That is also how OHILI's members and other heating-oil companies understand the law to work. It prevents them from saying that there is a 2% or 3% surcharge on heating oil, even if they disclose the surcharge prominently.

4. I have been made aware that the Office of the Attorney General is now saying that the No-Surcharge Law is not an outright ban on surcharges, but is really just a false-advertising law. That is news to me. I have never heard the Attorney General or anyone else claim that it is lawful for a merchant to impose a surcharge, as long as the charge is prominently disclosed. In fact, the Attorney General told companies, including OHILI members, that they had to call the charge a cash "discount," and was quoted as saying this in press accounts at the time. And the Attorney General secured settlements barring merchants from imposing surcharges, however prominently they were disclosed.

5. On its face, the No-Surcharge Law is bad public policy. Using a credit card costs money, and someone has to bear that cost. In our industry, the difference between a customer paying with a credit card and paying by cash or check can be as much as 5 to 10 cents per gallon. That might be this amount is almost equal to our members' after-tax profit margin. Allowing our members to label the inherent cost of a credit card transaction as a separate "surcharge"...(so that consumers know exactly what they are paying for by using a credit card and can therefore choose whether to use cash if they wish)...would enhance the transparency of the financial transaction to the benefit of both our members' businesses and their customers.

I declare, under penalty of perjury, that the foregoing is true and correct.

Dated: Happauge, New York

July 24, 2013

s/ Kevin Rooney

Kevin Rooney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF NICHOLAS J. DAMADEO

I, Nicholas J. Damadeo, do declare:

1. I am a member in good standing of the New York Bar. I serve as General Counsel to the New York Oil Heating Association and General Counsel to the Oil Heat Institute of Long Island, both of which represent full-service heating oil companies in New York State. I also represent many heating oil companies—both members and non-members of those two organizations. To my knowledge, all of these companies take credit cards.

2. In 2009, the New York Attorney General launched an investigation into alleged violations of the state's credit card surcharge law (General Business Law 518) by many heating-oil companies, including some of my clients. This investigation was the first time my clients had any issue involving the no-surcharge law. We had no involvement with the surcharge law until then because there had been no known consumer complaints about the issue. I would have known if there had been any consumer complaints because it was my job to review them.

3. As a result of the investigations, I believe the Attorney General obtained agreement from all of the companies involved to stop imposing credit-card surcharges.

4. Based on my experience during these investigations, including conversations with representatives of the Attorney General's office, it is my understanding that the no-surcharge law turns on nothing but semantics. The law permits "discounts" for cash but prohibits "surcharges" for credit, even though they are the same thing. I have thought a great deal about the topic and I cannot discern any meaningful difference between a surcharge and a discount. If a gas station, for example, posts both a credit-card price and a cash price, is it offering a surcharge or a discount?

5. As a result of these experiences, I have counseled my clients that, when they are called over the phone and asked for their price, they should quote the price including the amount of the credit-card surcharge and then explain that a cash "discount" from that price is available. But they cannot quote a price and then explain that it is five cents more to use a credit card. In other words, "five cents less for cash" is okay but "five cents more for credit" is not. It has everything to do with how

you say it. Most of my clients now offer cash "discounts" instead of credit-card "surcharges".

6. The New York no-surcharge law makes no rational sense because compliance is based upon semantics and not upon conduct. It regulates absolutely no conduct whatsoever. It is akin to a law that says it is acceptable to say that a glass is "half full" but criminalizes a description of the same glass as "half empty."

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Huntington, New York on July 25, 2013.

s/ Nicholas J. Damadeo

Nicholas J. Damadeo

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF JOHN CONOVER

John Conover declares as follows:

1. I am the owner of Southville Petroleum, a registered diesel and heating-oil company based in East Northport, New York. Southville sells and delivers heating oil and diesel fuel products for residential and commercial purposes.

2. Southville prides itself on providing quality service to our customers. In keeping with this, we give customers the option of paying for purchases with a credit card. Providing this option isn't free. Whenever a

customer uses a credit card, we incur a cost, usually between 2% and 3% of the purchase price, which is a significant expense for a small business in an industry like ours.

3. Several years ago, in an effort to reduce this expense, we began imposing a small fee on credit-card transactions. We expressed this fee as a price per gallon. For instance, if a customer called asking about our prices, we would tell them that we charge $2.99/gallon for oil, with an additional charge of $.03/gallon if the customer pays with a credit card. We charged between $.03/gallon and $.05/gallon to customers who paid with a credit card, depending on our costs. We always informed the customer what the charge would be.

4. In 2009, we received an anonymous call from someone asking about our prices. One of our employees informed the person of our prices, and then told them that we charge "three cents per gallon more" for a credit card purchase. After that phone call, the Attorney General's office notified us that we were imposing an illegal surcharge under New York's No-Surcharge Law, General Business Law § 518. On June 25, 2009, I met with Alan B. Berkowitz, Acting Assistant Attorney General.

5. On June 25, 2009, I met with Alan B. Berkowitz, Assistant Attorney General. Mr. Berkowitz explained to me that Southville would have to stop imposing a surcharge on credit-card transactions, provide restitution to customers who had paid the charge, and pay a fine to the state. I did not contest the charges or hire a lawyer, and I signed an Assurance of Discontinuance agreeing to comply with the Attorney General's demands, including its demand that we not charge customers a surcharge for payment by credit card.

6. I have recently been informed that the Attorney General is now claiming that the No-Surcharge Law is aimed only at false advertising—that it just prohibits deceptive surcharges, not all surcharges. But that is not what the Attorney General's Office told us in 2009. We were targeted because we said that we charge "three cents per gallon more" for using a credit card. We were never told that we could impose a credit-card surcharge if only we told customers about this ahead of time. In fact, every customer who paid a surcharge was well aware of it, and could have made a decision to use cash or check to avoid paying the charge.

7. To this day, I don't charge differently for cash or credit. The law is too convoluted. I just calculate the cost of accepting credit and incorporate that cost into my products, whether customers pay by cash, check or card.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: East Northport, New York
July 25, 2013

s/ John Conover

John Conover

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

----------X

In the Matter of AOD#
NAPCO OIL HEAT CORP.

----------X

ASSURANCE OF DISCONTINUANCE PURSUANT TO EXECUTIVE LAW § 63(15)

Pursuant to the provisions of Article 22-A of the General Business Law and §63(12) of the Executive Law, ANDREW M. CUOMO, Attorney General of the State of New York caused an inquiry to be made into the business practices of NAPCO OIL HEAT CORP. ("NAPCO"), and based upon that inquiry makes the following findings:

FINDINGS

1. NAPCO is a New York corporation located at 133 Cortland Street, Lindenhurst, NY, 11757. NAPCO is engaged in the business of providing home heating oil and services in the State of New York.

2. NAPCO has been providing home heating oil and services for a number of years.

3. In conducting its home heating business, NAPCO uses various types of contracts. The Attorney General's inquiry relates to the home heating oil delivery for the 2008-2009 season. In setting its price for fuel oil, NAPCO regularly imposed a surcharge on consumers who chose to use a credit card as opposed to paying by cash or check.

4. Under General Business Law §518, no seller in any sales transaction may impose a surcharge on a purchaser who elects to use a credit card in lieu of payment by cash, check, or similar means. An investigation by the Office of the Attorney General

reveals that consumers were regularly and routinely charged these illegal surcharges by NAPCO.

5. By reason of the foregoing, the Attorney General asserts that PARKSIDE has engaged in conduct which violates General Business Law §518.

ASSURANCE

6. IT NOW APPEARS that NAPCO desires to settle and resolve the investigation. Accordingly, the Attorney General and NAPCO hereby enter into this Assurance of Discontinuance.

7. IT IS HEREBY UNDERSTOOD AND AGREED by NAPCO, its officers, directors, agents, employees and assignees, and any individual or entity through which NAPCO may now or hereafter act, as follows:

8. NAPCO shall not enforce provisions of any contract or any contract that includes a credit card surcharge in violation of General Business Law §518. Furthermore, NAPCO shall not charge consumers a surcharge for payment by credit card.

9. In consideration of the making and execution of this Assurance, and within one-hundred and eighty days thereafter, NAPCO agrees that is will pay by wire transfer, certified check or bank check payable to the State of New York $3,000 in penalties, fees and costs.

10. Subsequent to its initial meeting with the Office of the Attorney General, NAPCO ceased imposing a credit card surcharge on its customers, and has agreed to provide a refund to its customers of all previously imposed surcharges for the period of September 2008 to present within thirty days of the execution of this assurance. These refunds will be made as a credit to the customers' home heating oil account and documentation

of these refunds has been provided to the Office of the Attorney General.

11. NAPCO shall maintain, and upon request, make available to the Office of the Attorney General, for one year after the execution of this Assurance, copies of all contracts that will demonstrate compliance with the requirements of this Assurance.

12. This Assurance concludes the investigation, and precludes any action that the Office of the Attorney General could commence against NAPCO and its affiliates for the acts, omissions and practices which are stated in this Assurance, except nothing contained herein precludes the Office of the Attorney General from bringing an action and/or proceeding to enforce NAPCO's obligations arising out of or relating to this Assurance.

COMPLIANCE REPORT TO THE ATTORNEY GENERAL

13. IT IS FURTHER AGREED that NAPCO shall file with the Office of the Attorney General, no later than sixty days after executing this Assurance, an affidavit, sworn to by a knowledgeable employee of NAPCO, attesting that all required refunds have been made and demonstrating that it is in full compliance with the terms of this Assurance.

MISCELLANEOUS

14. Nothing contained herein shall be construed so as to deprive any person of any private right under the law.

15. Pursuant to Executive Law §63(15), evidence of a violation of this of Discontinuance shall constitute *prima facie* proof of a violation of the applicable statutes in any civil proceeding thereafter commenced by the Attorney General.

WHEREFORE, the following signatures affixed hereto this 25 day of June, 2009.

NAPCO OIL HEAT CORP.
By: Robert Nappe
President

CONSENTED TO:

ANDREW M. CUOMO
Attorney General of the State of New York

By: Alan B. Berkowitz
Assistant Attorney General

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

----------X

In the Matter of AOD#

ROCKY & MARCIANO FUEL OIL, INC.

----------X

ASSURANCE OF DISCONTINUANCE PURSUANT TO EXECUTIVE LAW § 63(15)

Pursuant to the provisions of Article 22-A of the General Business Law and §63(12) of the Executive Law, ANDREW M. CUOMO, Attorney General of the State of New York caused an inquiry to he made into the business practices of ROCKY & MARCIANO FUEL OIL, INC. ("ROCKY & MARCIANO"), and based upon that inquiry makes the following findings:

FINDINGS

1. ROCKY & MARCIANO is a New York corporation located at 971 Unit E, Holbrook, NY, 11741. ROCKY & MARCIANO is engaged in the business of providing home heating oil and services in the State of New York.

2. ROCKY & MARCIANO has been providing home heating oil and services for a number of years.

3. The Attorney General's inquiry relates to the home heating oil delivery for the 2008-2009 season. In setting its price for fuel oil, ROCKY & MARCIANO regularly imposed a surcharge on consumers who chose to use a credit card as opposed to paying by cash or check.

4. Under General Business Law §518, no seller in any sales transaction may impose a surcharge on a purchaser who elects to use a credit card in lieu of payment by cash, check, or similar means. An investigation by the Office of the Attorney General

reveals that consumers were regularly and routinely charged these illegal surcharges by ROCKY & MARCIANO.

5. By reason of the foregoing, the Attorney General asserts that ROCKY & MARCIANO has engaged in conduct which violates General Business Law §518.

ASSURANCE

6. IT NOW APPEARS that ROCKY & MARCIANO desires to settle and resolve the investigation. Accordingly, the Attorney General and ROCKY & MARCIANO hereby enter into this Assurance of Discontinuance.

7. IT IS HEREBY UNDERSTOOD AND AGREED by ROCKY & MARCIANO, its officers, directors, agents, employees and assignees, and any individual or entity through which ROCKY & MARCIANO may now or hereafter act, as follows:

8. ROCKY & MARCIANO shall not enforce provisions of any contract or any contract that includes a credit card surcharge in violation of General Business Law §518. Furthermore, ROCKY & MARCIANO shall not charge consumers a surcharge for payment by credit card.

9. In consideration of the making and execution of this Assurance, and within one-hundred and eighty days thereafter, ROCKY & MARCIANO agrees that is will pay by wire transfer, certified check or bank check payable to the State of New York $4000 in penalties, fees and costs.

10. Subsequent to its initial meeting with the Office of the Attorney General, ROCKY & MARCIANO ceased imposing a credit card surcharge on its customers, and has agreed to provide a refund to its customers of all previously imposed surcharges for the period of

September 2008 to present within thirty days of the execution of this assurance. These refunds will be made as a credit to the customers' home heating oil account and documentation of these refunds has been provided to the Office of the Attorney General.

11. ROCKY & MARCIANO shall maintain, and upon request, make available to the Office of the Attorney General, for one year after the execution of this Assurance, copies of all contracts that will demonstrate compliance with the requirements of this Assurance.

12. This Assurance concludes the investigation, and precludes any action that the Office of the Attorney General could commence against ROCKY & MARCIANO and its affiliates for the acts, omissions and practices which are stated in this Assurance, except nothing contained herein precludes the Office of the Attorney General from bringing an action and/or proceeding to enforce ROCKY & MARCIANO's obligations arising out of or relating to this Assurance.

COMPLIANCE REPORT TO THE ATTORNEY GENERAL

13. IT IS FURTHER AGREED that ROCKY & MARCIANO shall file with the Office of the Attorney General, no later than sixty days after executing this Assurance, an affidavit, sworn to by a knowledgeable employee of ROCKY & MARCIANO, attesting that all required refunds have been made and demonstrating that it is in full compliance with the terms of this Assurance.

MISCELLANEOUS

14. Nothing contained herein shall be construed so as to deprive any person of any private right under the law.

15. Pursuant to Executive Law §63(15), evidence of a violation of this Assurance of Discontinuance shall

constitute *prima facie* proof of a violation of the applicable statutes in any civil proceeding thereafter commenced by the Attorney General.

WHEREFORE, the following signatures affixed hereto this 17 day of July, 2009.

ROCKY & MARCIANO FUEL OIL, INC.
By: Eileen Marciano
President

CONSENTED TO:

ANDREW M. CUOMO
Attorney General of the State of New York

By: Alan B. Berkowitz
Assistant Attorney General

Attorney General Cuomo Issues Consumer Alert For Nyc Drivers After Investigation Reveals Nearly 25% Of Nyc Area Gas Stations Inspected Engaged In Deceptive Practices

NEW YORK, N.Y. (August 28, 2008) - With New York City drivers hitting the road for Labor Day weekend, Attorney General Andrew M. Cuomo today issued a consumer alert after his office's undercover investigation into the sale of gasoline found that approximately one-fourth of New York City area gas stations engage in deceptive practices, including wrongfully surcharging credit card customers. Cuomo's statewide investigation discovered that New York City, along with the Long Island region, has far more gas stations that illegally overcharge customers for gas than any other region in the state. Under New York State law, retailers are not allowed to impose a surcharge on customers for using a credit card.

In addition, Cuomo's investigation also identified instances where gas stations across the five boroughs engaged in false advertising by only listing the lower cash prices on their street-view signage in order to lure patrons to the pump. In several cases, the stations failed to disclose that the price was only for cash transactions. Once at the pump, consumers discovered that they were charged more for using a credit card - a deceptive "bait and switch" practice.

Today, Cuomo warned drivers across the New York City area to be on the guard for gas stations that overcharge credit card users at the pump. His office is also in the process of sending "cease-and-desist" letters to approximately 30 gas stations across the city that were found to be engaged in deceptive and unlawful practices, and is following up on the hundreds of

consumer complaints it received since the investigation was announced last week on Long Island.

"With drivers hitting the road this weekend and gas prices through the roof, the last thing New York City drivers need are gas stations hitting them with exorbitant prices for paying with a credit card," said Attorney General Cuomo. "Drivers across New York City need to be on the guard for gas stations that engage in deceptive practices to squeeze every last dollar out of their customers. Our investigation revealed that New York City is rife with gas stations that engage in deceptive practices where they display one price as a way to lure customers - and then charge them more at the pump."

Attorney General Cuomo's office conducted an investigation that inspected approximately 130 gas stations across the city and found that approximately one-fourth of gas stations were engaged in deceptive practices by either charging customers more for using a credit card, or by posting only the lower cash prices on their large, street-facing signs in order to lure patrons to their station and then charging them more at the pump.

Cuomo noted that customers who use credit cards already pay a premium to the credit card company. An additional "usage fee" at the pump doubly penalizes the customer. The investigation also determined that by withholding the higher credit card price until the consumer has already parked at the pump, the stations mislead consumers and prevent honest comparative price shopping from the street. Some gas stations did include the word "cash" in small letters on the large signs, but the word was too small or faint to read from the street.

This behavior comes at a time when reports show that gasoline prices this summer are more than 32 percent higher than they were last summer.

The Automobile Association of America (AAA)'s Director of Government Affairs, John A. Corlett, said, "The AAA commends Attorney General Cuomo for undertaking this initiative. AAA is a proud partner in this fight. His warning to the stations engaging in this deceptive act is a welcome service to drivers who desperately need relief at the gas pump."

Consumers who see gas stations prominently advertising the cash-only price on primary signage and then indicating at the pump that credit card customers will be charged more are urged to contact the Attorney General's Consumer Helpline at 1-800-996-4630.

The investigation is being conducted by Darcy Goddard, Assistant Attorney General, Kate Burson, Assistant Attorney General, Deputy Chief Investigator Thomas Richardson, Supervisor Investigator Georgia Nurse, Investigator Paul Matthews, Investigator William Lightbody, and Investigator Andre Job.

Attorney General Cuomo Announces Investigation Revealing Nearly One-third Of Long Island Gas Stations Inspected Engaged In Deceptive Practices

MINEOLA, N.Y. (August 21, 2008) - Attorney General Andrew M. Cuomo today announced that an ongoing investigation by his office into the sale of gasoline has found that approximately one-third of Long Island gas stations surveyed engaged in deceptive practices, including wrongfully surcharging credit card customers. Cuomo's statewide investigation discovered that the Long Island region has far more gas stations that illegally overcharge customers for gas than any other region in the state. Under New York State law, retailers are not allowed to impose a surcharge on customers for using a credit card.

In addition, Cuomo's investigation also identified instances where gas stations across Long Island engaged in false advertising by only listing the lower cash prices on their street-view signage in order to lure patrons to the pump. In several cases, the stations failed to disclose that the price was only for cash transactions. Once at the pump, consumers discovered that they were charged more for using a credit card - a deceptive "bait and switch" practice.

Today, Cuomo announced that his office is in the process of sending "cease-and-desist" letters to approximately 43 gas stations that were found to be engaged in deceptive and unlawful practices.

"With summer gas prices reaching an all-time high, the last thing Long Island drivers need are gas stations hitting them with exorbitant prices for paying with a credit card," said Attorney General Cuomo. "Our investigation revealed that Long Island is a hotbed for gas stations that engage in deceptive practices where

they display one price as a way to lure customers - and then charge them more at the pump."

Attorney General Cuomo's office conducted an investigation that inspected approximately 120 gas stations in Nassau and Suffolk counties and found that an estimated one-third of gas stations were engaged in deceptive practices by either charging customers more for using a credit card, or by posting only the lower cash prices on their large, street-facing signs in order to lure patrons to their station and then charging them more at the pump.

Attorney General Cuomo Announces Nationwide Investigation Into Debt Settlement Industry

ALBANY, N.Y. (May 8, 2009) Attorney General Andrew M. Cuomo today announced that his office has reached settlements with six New York-based home heating oil companies serving the Hudson Valley, Catskills, Southern Tier and North Country for various violations over the past year, including improperly adding surcharges for credit card payments and failing to provide required notifications to consumers.

The agreements with Paraco Gas Corporation, Depew Oil Company, Inc., Vaincourt Fuels, Wilson Oil, Kuno Oil and Russo Fuel end various deceptive practices and provide refunds to more than 500 consumers who were wrongfully charged, as well as penalties and costs to the state.

"Home heating costs account for a substantial portion of most hard-working New Yorkers household budgets, and any illegitimate or surprise costs added to the bill are unacceptable," said Attorney General Cuomo. "It is particularly disturbing when companies take advantage of consumers purchasing such a basic and needed service. I continue to urge all consumers to thoroughly review contracts before signing and to alert my office if they believe they are being subjected to misleading or deceptive acts."

Rye Brook-based Paraco Gas Corporation services approximately 65,000 customers and has offices in the Hudson Valley, Catskills and Southern Tier. The Attorney General's Office found that Paraco sent deceptive contracts that may have led consumers to believe they were signing up for fuel delivery for the 2008-2009 heating season only. However, the contracts constituted a 7-year commitment. The company also

failed to notify customers in advance over automatic contract renewals.

The Attorney General's agreement requires Paraco to reform its practices and contract language and pay $12,000 in penalties and costs to the state. The agreement also prohibits Paraco from penalizing customers who did not receive adequate notification of contract renewal and wish to cancel service.

Attorney General Cuomo's Office also found that Newburgh-based DePew Oil Company, Inc. improperly charged a 2 percent service charge on credit card payments. State law prohibits a surcharge on the use of a credit card for purchases. After intervention by the Attorney General's Office, DePew stopped the practice and paid $6,970.47 in refunds.

Vaincourt Fuels, based in Malone, sells home heating oil, kerosene and related services in the North Country. Vaincourt entered into a settlement with the Attorney General's Office requiring the company to immediately stop engaging in deceptive debt collection practices and pay $5,000 in penalties and costs to the state. In an attempt to collect on overdue payments, the Attorney General's Office found that the company sent collection letters that included:

- A statement that gives the appearance that Vaincourt had an established relationship with a local court and that a judgment in its favor would be automatic. For instance: "We will take you to Westville Town Court. This will cost you approximately $100-$200 more than what you owe. The Judge will award the judgment to Vaincourt Fuels."
- Improperly suggesting that Vaincourt has a relationship with the customer's employer and has successfully garnished wages through them

before. For instance: "It has been effective for us in the past to have wages garnished through your current employer."

The Attorney General's Office also determined that three other home heating fuel companies were also illegally charging surcharges for credit card payments:

- Wilson Oil, located in Beacon, wrongfully charged 41 customers surcharges for oil deliveries paid for with credit cards. After the Attorney General's involvement, the company refunded the charges, totaling $678.30.
- Kuno Oil, based in Canton, improperly charged surcharges to 26 customers, totaling $496.26. Upon the Attorney General's intervention, the company agreed to refund the charges to customers.
- Russo Fuel, Inc, located in Highland, wrongfully charged surcharges to six customers for fuel deliveries. Once the Attorney General contacted the company, Russo refunded a total of $163.10 to the customers who were charged.

The three companies have all agreed to no longer charge surcharges for credit card payments.

Consumers who believe they have been subjected to fraud or deceptive practices are urged to contact the Attorney General's Office at 800-771-7755. Contact information for local regional offices can be found online at www.ag.ny.gov.

Attorney General Cuomo Stops Oneida County Used Car Dealer From Overcharging For Dmv Registration Fees And Implementing Surcharges On Credit Card Purchases

UTICA, N.Y. (June 1, 2009) - Attorney General Andrew M. Cuomo today announced an agreement with an Oneida County-based used car dealership that ends its years-old practice of overcharging customers for Department of Motor Vehicle (DMV) registration fees and then failing to refund leftover money. The dealership was also improperly charging surcharges on purchases made with a credit card.

As part of the agreement with Attorney General Cuomo's Office, Auto One Group, Inc, located on State Route 233 in Clinton, and its owner Matthew Crever, must fully refund consumers who were overcharged for DMV registration fees and pay $30,000 in civil penalties to New York. The Attorney General's Office estimates up to 1,000 consumers are owed restitution that could total $50,000.

"This company raked in tens of thousands of dollars by falsely inflating vehicle registration fees in an effort to dupe unsuspecting consumers," said Attorney General Cuomo. "Slipping in deceptive and hidden fees into the purchase price of any item, including automobiles, will not go unchecked by my office."

Like many dealerships, as a method of convenience, Auto One offered customers the opportunity to pay their DMV registration fee directly to the dealership since 2006. The dealership typically charged customers a $150 fee for registration for vehicles purchased without a trade-in and $110 for vehicles purchased with a trade-in.

The DMV typically charges $50 for a New York State Certificate of Title, $49.50 for registration for two years (slightly varying depending on the weight of the vehicle)

and $15 for license plates. For purchases with trade-ins, purchases normally carry a $50 charge for certificate of title, $7.75 for the transfer of existing registration to the new vehicle and an amount to cover the difference in weight between the two vehicles.

Overall, consumers electing for this service were typically charged anywhere from $15 to $52 above the actual cost of registering a vehicle. Based upon the number of customers Auto One served, the aggregate dollar amount could reach $50,000.

In addition to refunding consumers and ending the overcharges, Auto One must stop from imposing a surcharge for the use of credit cards, which is illegal under New York General Business Law.

As part of the agreement, Auto One must hire an independent Certified Public Accountant to ensure that eligible consumers are properly refunded. Consumers who believe they have been overcharged are urged to contact Attorney General Cuomo's Utica Regional Office at (315) 793- 2225.

The case was handled by Assistant Attorney General In-Charge of the Utica Regional Office Joel Marmelstein with assistance from Investigator Joseph Kelly and DMV Senior Investigator Grace Isgro.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

June 2, 2011

Via Certified Mail—Return Receipt Requested

Mr. Moan S. Chhhokatr
Rajit Inc.
Valero Gas Station
262 Arsenal Street
Watertown, NY 13601

Cease & Desist

Dear Mr. Chhokatr:

It has come to the attention of the New York State Attorney General's Office that the Valero Gas Station at 262 Arsenal Street, Watertown, New York, has been posting gasoline prices which, in small print, are limited to cash sales only. The roadside listing of a price without equally prominent disclosure of the higher standard price for credit purchases violates the New York Executive Law 63(12) prohibition against deceptive acts and practices, as well as the General Business Law 349 prohibition against deceptive business practices.

Complaints from consumers lured into gas stations based upon the low roadside posting only to find that the price only applies to cash payments, confirm that consumers are being detrimentally misled by this style of signage. It is the opinion of this office that these inadequacies constitute deceptive practices as prohibited by New York State Executive Law 63(12) and General Business Law section 349.

Please confirm that your business has discontinued roadside advertising of a limited cash pricing without

similarly posting the credit price, and ***immediately cease and desist utilization of the marketing solicitation*** in the format described. Kindly advise within 5-days as to what steps your business has taken to remedy the above-cited deficiency.

Thank you for your anticipated cooperation.

Very truly yours,

Deanna R. Nelson
Assistant Attorney General
In-Charge
Office of NYS Attorney General
Eric T. Schneiderman

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
NOV 14 2016
OFFICE OF THE CLERK

No. 15-1391

In the Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM, and DAVID ROSS, *Petitioners*,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; ERIC GONZALEZ, in his official capacity as Acting District Attorney of Kings County, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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November 14, 2016

QUESTION PRESENTED

New York, like all states, allows merchants to charge higher prices to consumers who pay with a credit card instead of cash. But New York's no-surcharge law, N.Y. Gen. Bus. Law § 518, requires merchants to label that price difference as a cash "discount" and makes it a crime—punishable by up to one year in jail—to label it as a credit-card "surcharge." The question presented is whether New York's no-surcharge law unconstitutionally restricts speech.

CORPORATE DISCLOSURE STATEMENT

No publicly held corporation owns 10% or more of any petitioner's stock. Nor is any petitioner a subsidiary of any parent company.

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44 Liquormart, Inc. v. Rhode Island,
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American Booksellers Association, Inc. v. Hudnut,
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Arizonans for Official English v. Arizona,
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Babbitt v. United Farm Workers National Union,
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Baggett v. Bullitt,
377 U.S. 360 (1964) 45

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) 27

BellSouth Telecommunications, Inc. v. Farris,
542 F.3d 499 (6th Cir. 2008) ..... *passim*

Brown v. Entertainment Merchants Association,
564 U.S. 786 (2011) 44

Central Hudson Gas & Electric Corp., Inc. v. Public Service Commission of New York,
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City of Cincinnati v. Discovery Network, Inc.,
507 U.S. 410 (1993) 42

Dana's Railroad Supply v. Attorney General,
807 F.3d 1235 (11th Cir. 2015) ..... *passim*

Dombrowski v. Pfister,
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Edenfield v. Fane,
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FCC v. Fox Television Stations, Inc.,
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First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 33

Greater New Orleans Broadcasting Association, Inc. v. United States,
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Houston v. Hill,
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In re R.M.J.,
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Italian Colors Restaurant v. Harris,
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Lochner v. New York,
198 U.S. 45 (1905) 35

Motor Vehicle Manufacturers Association v. Abrams,
684 F. Supp. 804 (S.D.N.Y. 1988) 35

NAACP v. Button,
371 U.S. 415 (1963) 44

Peel v. Attorney Registration & Disciplinary Commission,
496 U.S. 91 (1990) 43

People v. Fulvio,
517 N.Y.S.2d 1008 (N.Y. Crim. Ct. 1987) ..... *passim*

Railroad Commission of Texas v. Pullman Co.,
312 U.S. 496 (1941) 25, 45

Reed v. Town of Gilbert, Arizona,
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Reno v. American Civil Liberties Union,
521 U.S. 844 (1997) 27, 44, 45, 51

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) ..... *passim*

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011) ..... *passim*

State by Abrams v. Camera Warehouse, Inc.,
496 N.Y.S.2d 659 (N.Y. Sup. Ct. 1985) 17

Thompson v. Western States Medical Center,
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Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
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Zwicker v. Koota,
389 U.S. 241 (1967) 45

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N.Y. Crim. Proc. Law § 520.10(1)(i) 40

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N.Y. Gen. Bus. Law § 518 ..... 1, 4, 6, 16

N.Y. Pub. Auth. Law § 1045-j(4-a)(b) 40, 43

Legislative materials

156 Cong. Rec. S3588 (May 12, 2010) 19

156 Cong. Rec. S4839 (June 10, 2010) 5

Cash Discount Act, 1981: Hearings on S. 414 Before the Senate Banking Committee, 97th Cong. (1981) ..... *passim*

H.R. 31, 97th Cong., 127 Cong. Rec. S2083 (Mar. 12, 1981) 11, 12

Pub. L. No. 93-495, 88 Stat. 1500 (1974) 9

Pub. L. No. 94-222, 90 Stat. 197 (1976) 9, 10

Pub. L. No. 97-25, 95 Stat. 144 (1981) 12, 13

Regulatory materials

42 Fed. Reg. 780 (Jan. 4, 1977) 13

42 Fed. Reg. 38171 (July 27, 1977) 13

43 Fed. Reg. 3898 (Jan. 30, 1978) 13

45 Fed. Reg. 29702 (May 5, 1980) 13

45 Fed. Reg. 80648 (Dec. 5, 1980) 13

70 Fed. Res. Bull. 309 (Apr. 1984) 14, 49

Other authorities

AdAge Insights Trend Report, *Financial Services Marketing* (2012) 33

American Express, Merchant Reference Guide – U.S. (Oct. 2016) 16

Terri Bradford & Fumiko Hayashi, Federal Reserve Bank of Kansas City, *Developments in Interchange Fees in the United States and Abroad* (Apr. 2008) 5

Zach Carter & Ryan Grim, *Swiped: Banks, Merchants and Why Washington Doesn't Work for You*, Huffington Post, Apr. 28, 2011 19

Christopher Dodd, *Credit Card Surcharges*, N.Y. Times, Mar. 12, 1984 13

Stephen Engelberg, *Credit Card Surcharge Ban Ends*, N.Y. Times, Feb. 27, 1984 14

Federal Reserve Bank of Kansas City, *Credit and Debit Card Interchange Fees in Various Countries* (Aug. 2015) 5

Jon Hanson & Douglas Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420 (1999) 6

Betsy Horkovich, *The Cash Discount Act: More Than Just a Matter of Semantics?*, 8 U. Dayton L. Rev. 137 (1982) 30

Daniel Kahneman, et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193 (1991) 6

Edmund Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217 (1990) 8, 9, 14

Carol Krucoff, *When Cash Pays Off*, Wash. Post, Sept. 22, 1981 ..... 11, 13

Adam Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321 (2008) 5, 6, 31

Adam Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265 (2006) 7

Irvin Molotsky, *Extension of Credit Surcharge Ban*, N.Y. Times, Feb. 29, 1984 14

David Morrison, *7-Eleven Claims Millions of Interchange Signatures*, Credit Union Times, Sept. 28, 2009 20

Gerald P. O'Driscoll, Jr., *The American Express Case: Public Good or Monopoly?*, 19 J.L. & Econ. 163 (1976) 9

Wayne T. Price & Amanda Stratford, *Store Owner Takes Petition to Congress*, Fla. Today, Sept. 29, 2009 20

Scott Schuh, et al., Federal Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments?* (2010) 5, 8

Hilary Stout, *Credit Issuers Lift Rules on Credit Surcharges*, N.Y. Times, Dec. 20, 2013 6

Cass Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 Nw. U. L. Rev. 1295 (2003) 7

Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251 (1986) 9

Elizabeth Warren, *Antitrust Issues in Credit Card Merchant Restraint Rules* (2007) 8

INTRODUCTION

Despite what the ads may say, credit cards aren't "priceless." Each time a consumer pays by credit card, the merchant incurs a swipe fee. These fees, imposed by the credit-card issuers on every transaction, are typically passed on to *all* consumers through higher prices. But, if a merchant chooses, she may instead pass on the cost only to those who pay by credit card. She may do so by charging two prices: a higher price for those who pay by credit card, a lower one for those who pay in cash.

All states allow such dual pricing. But a New York statute, N.Y. Gen. Bus. Law § 518, seeks to control how merchants may *communicate* the price difference to consumers: It allows merchants to offer "discounts" to those who pay in cash, but makes it a crime to impose equivalent "surcharges" on those who pay by credit card.

A "surcharge" and a "discount" are just two ways of framing the same price information—like calling a glass half full instead of half empty. But consumers react very differently to the two labels, perceiving a surcharge as a penalty for using a card. Precisely because the surcharge label is most effective at communicating the true cost of credit cards, the credit-card industry has long insisted that it be suppressed. As one industry lobbyist put it, a surcharge "makes a negative statement about the card to the consumer" and "talk[s] against the credit industry." In justifying its law, the state openly relied on the effectiveness of the two labels, "even if only psychologically," to encourage or discourage "desired behavior." JA 89.

New York's no-surcharge law in effect says to merchants: If you use dual pricing, you may tell your customers only that they are paying *less* to pay without credit (a "discount"), not that they are paying *more* to pay with credit (a "surcharge")—even though they *are* paying more. Liability thus turns on the speech used to

describe identical conduct—nothing else. Under this regime, a merchant who charges two different prices for a widget depending on how the customer pays (for example, $100 for cash and $102 for credit) may say that the widget costs $102 and that there is a $2 discount for paying in cash. But if the merchant instead says that the widget costs $100 plus a $2 credit-card surcharge, that is a crime—punishable by up to a year in prison.

The first reported criminal prosecution targeted a gas station owner because his cashier made the mistake of truthfully telling a customer that it would cost "five cents extra" to pay with a credit card, instead of a "nickel less" to use cash. *People v. Fulvio*, 517 N.Y.S.2d 1008, 1013 (N.Y. Crim. Ct. 1987). The court vacated the conviction on constitutional grounds, reasoning that the statute treats "precisely the same conduct ... either as a criminal offense or as lawfully permissible behavior, depending only upon the *label* the individual affixes to his economic behavior." *Id.* at 1011. In recent years, New York's Attorney General has continued to target merchants under this law, calling them up anonymously to test whether they use the right words. JA 106, 124. The state even gave out "a script of what [to] tell customers when talking to them over the phone." JA 107.

The petitioners here are five merchants who challenge this statute under the First Amendment. Until recently, Expressions Hair Design displayed a sign stating that, "due to the high swipe fees charged by the credit-card industry," it would charge 3% "more" for using a credit card. JA 60. It was forced to take down its sign because of New York's law. Expressions still employs dual pricing but worries it may slip up and say the wrong thing—the law is "hard to understand and even harder to follow." JA 62. "If a customer asks us whether we charge more for paying with a credit card," its owner wonders, "[a]re we required to answer falsely?" *Id.*

Because New York's law keeps consumers in the dark by criminalizing truthful speech, it is subject to First Amendment scrutiny. As this Court recognized in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757, 764 (1976), merchants have a right to speak about "who is charging what" and consumers have a "reciprocal right to receive" that speech. The "free flow" of this price information drives our "free enterprise system" and fosters the "formation of intelligent opinions as to how that system ought to be regulated." *Id.* at 765. By censoring merchants' preferred and most effective way of delivering this information, the no-surcharge law seeks to prevent "the reactions it is assumed people will have" to the truth about credit cards. *Id.* at 769. *Virginia State Board* was clear: states may not "suppress the dissemination of concededly truthful" speech because of its "effect upon its disseminators and its recipients." *Id.* at 773.

The New York Attorney General dutifully defends the state's law as one that "falls squarely within the heartland" of straightforward "economic regulation." NY CA2 Br. 29-30. But others (whose job is not to defend the law) have seen it differently. A busy criminal-court judge in the Bronx felt compelled to invoke Shakespeare. *Fulvio*, 517 N.Y.S.2d at 1015 ("That which we call a Rose / By any other name would smell as sweet."). For Judge Rakoff, the statute brings to mind Lewis Carroll's word games. Pet. App. 56a ("*Alice in Wonderland* has nothing on Section 518."). And, to others, it smacks of Orwellian language control, treating "discounts as *more equal* than surcharges" and "purging from merchants' vocabularies the *doubleplusungood* surcharge." *Dana's R.R. Supply v. Att'y Gen.*, 807 F.3d 1235, 1247, 1251 (11th Cir. 2015).

Because the no-surcharge law "crumbles under any level" of First Amendment scrutiny, *id.* at 1239, and because it is hopelessly vague, this Court should reverse.

OPINIONS BELOW

The Second Circuit's amended opinion (Pet. App. 1a) is reported at 808 F.3d 118. The district court's opinion (Pet. App. 55a) is reported at 975 F. Supp. 2d 430.

JURISDICTION

The Second Circuit denied a petition for rehearing en banc on January 13, 2016, and Justice Ginsburg granted an extension of the time to file a petition for certiorari until May 12, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New York General Business Law § 518 provides:

> No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.
>
> Any seller who violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or a term of imprisonment up to one year, or both.

The First Amendment to the United States Constitution provides:

> Congress shall make no law … abridging the freedom of speech[.]

STATEMENT

The credit-card swipe fees paid by Americans are "among the highest in the world."[1] The typical fee is between 2% and 3% of the purchase amount, while fees are even higher in some cases. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1330, 1355 (2008). These fees add up. By processing over two trillion dollars in transactions, credit-card issuers receive over $50 billion in swipe fees annually. 156 Cong. Rec. S4839 (June 10, 2010).

The reason swipe fees are so high is that they have been kept hidden from consumers—the people who decide which payment method to use and thus determine whether a fee is incurred. "What most consumers do not know is that their decision to pay by credit card involves merchant fees, retail price increases, a nontrivial transfer of income from cash to card payers, and consequently a transfer from low-income to high-income consumers." Schuh, et al., Fed. Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments?* 1 (2010).

Although merchants may charge more for credit-card payments, they cannot communicate the added cost in the most effective way because credit-card companies have succeeded in insisting that any price difference be framed as a cash "discount," not a credit-card "surcharge." This speech code has long been imposed through private contract and state law. But over the last few years, the credit-card companies have removed their contractual no-surcharge rules in response to nationwide

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[1] Bradford & Hayashi, Fed. Reserve Bank of Kansas City, *Developments in Interchange Fees in the United States and Abroad* (Apr. 2008); *see also* Fed. Reserve Bank of Kansas City, *Credit and Debit Card Interchange Fees in Various Countries* (Aug. 2015).

antitrust litigation. *See* Stout, *Credit Issuers Lift Rules on Credit Surcharges*, N.Y. Times, Dec. 20, 2013. So state laws like New York's have now assumed sudden importance: They are the only thing stopping merchants from truthfully telling consumers that they impose a surcharge because credit cards cost more.

New York's no-surcharge law makes it a crime—punishable by a $500 fine and up to one year in prison—for any "seller in any sales transaction [to] impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. The law does not, however, outlaw dual pricing; "it permits offering cash customers a discount," if so expressed. Pet. App. 14a; *see* JA 82.

I. Why labels matter: the communicative difference between "surcharges" and "discounts"

A credit-card "surcharge" and a cash "discount" are just "different frames for presenting the same price information—a price difference between two things." Levitin, *Priceless*, 55 UCLA L. Rev. at 1351. They are equal in every way except one: the label that the merchant uses to communicate that difference.

But labels matter. "[T]he frame within which information is presented can significantly alter one's perception of that information, especially when one can perceive the information as a gain or a loss." Hanson & Kysar, *Taking Behavioralism Seriously*, 112 Harv. L. Rev. 1420, 1441 (1999). This difference in perception occurs because people tend to let "changes that make things worse (losses) loom larger than improvements or gains" of an equivalent amount. Kahneman, et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991). "People are averse to losses ... [S]imply through inventive terminology, it is possible to manipulate the frame so as

to make a change appear to be a loss rather than a gain, or vice versa"—for example, "a company that says 'cash discount' rather than 'credit card surcharge.'" Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 Nw. U. L. Rev. 1295, 1312 (2003).

"Consumers react very differently to surcharges and discounts." Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 280 (2006). They are much more likely to respond to surcharges (perceived as *losses* for using credit) than to discounts (perceived as *gains* for not using credit). *Id.*

The effectiveness of the surcharge label is why merchants, including the petitioners here, seek to employ it. The surcharge informs consumers of the cost of credit and thus creates meaningful competition, which in turn drives down that cost—as price-transparency reforms in other countries show. *Id.* at 312-13. If fees are too high, consumers will use a different payment method, and banks will have to lower their fees to attract business. *Id.*

But when the government bans framing the added cost as a surcharge, as New York has done, merchants lose their most effective means of informing consumers of the cost. And because the dividing line between surcharge and discount is so blurry, many merchants do not even attempt to offer dual pricing, even though the law allows it, to avoid accidentally subjecting themselves to criminal prosecution. JA 43-44, 48. The upshot is that merchants pass on swipe fees to *all* consumers by raising the prices of goods and services across the board. Because they will pay the same price regardless, consumers are unaware of how much they pay for credit and have no incentive to reduce their credit-card use. As a result, swipe fees soar. JA 42, 46, 55.

Swipe fees thus function as an invisible tax, channeling billions of dollars annually from consumers to banks. The fees are also highly regressive. In a reverse-Robin-Hood effect—criticized by prominent economists and advocates from Joseph Stiglitz to Elizabeth Warren—low-income cash purchasers subsidize the cost of credit cards, while enjoying none of their benefits or convenience. Schuh, *Who Gains and Who Loses*, at 21. According to Fed economists, "[b]y far, the bulk of [this subsidy] is enjoyed by high-income credit card buyers," who receive an average of $2,188 every year, paid disproportionately by poor households. *Id.* The result is a regime in which food-stamp recipients subsidize frequent-flier miles. Warren, *Antitrust Issues in Credit Card Merchant Restraint Rules* 1 (2007).

II. How we got here: the credit-card industry's efforts to prevent merchants from communicating the cost of credit

The invisibility of swipe fees is no accident. It is the product of concerted efforts over many decades. Over the years, the credit-card industry has succeeded, both through contractual provisions and legislation, in silencing merchants' attempts to call consumers' attention to the true costs of credit.

A. The industry's early ban on dual pricing and Congress's protection of cash discounts

In the early days of credit cards, any attempt at differential pricing between cash and credit was strictly forbidden by the contractual rules credit-card companies imposed on merchants. Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217, 219-20 (1990). But in 1974, as these rules faced mounting antitrust scrutiny, American Express settled a lawsuit by agreeing to allow merchants to provide consumers

with differential price information. *Id.* at 220; O'Driscoll, *The American Express Case: Public Good or Monopoly?*, 19 J.L. & Econ. 163, 164 (1976). Congress then enacted legislation granting merchants a non-waivable right to "offer[] a discount" to induce consumers "to pay by cash, check, or similar means" rather than by credit card. Pub. L. No. 93-495, 88 Stat. 1500, 1515 (1974) (codified at 15 U.S.C. § 1666f(a)).

B. The industry shifts its strategy to labels

Consumer advocates initially considered this 1974 legislation a victory. But "the credit card lobby turned its attention to form rather than substance," focusing on the way prices are communicated. Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behavior & Org. 39, 45 (1980). Aware that how information is presented can affect consumer behavior, the industry "insist[ed] that any price difference between cash and credit purchases should be labeled a cash discount rather than a credit card surcharge." Tversky & Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251, S261 (1986).

C. The industry's labeling strategy achieves short-lived success at the federal level

For a while, this lobbying paid off. In 1976, the industry persuaded Congress to enact a temporary ban on "surcharges," despite the authorization for "discounts." Pub. L. No. 94-222, § 3, 90 Stat. 197 ("No seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means.").

Congress defined the word "discount" to mean "a reduction made from the regular price," and added that it "shall not mean a surcharge." *Id.* (codified at 15 U.S.C. § 1602). A "surcharge," in turn, meant "any means of increasing the regular price to a cardholder which is not

imposed upon customers paying by cash, check, or similar means." *Id.* This distinction, however, proved difficult to pin down in practice. And it became increasingly clear that the ban served only to obscure the cost of credit.

Opposition to federal surcharge ban mounts. By the early 1980s, opposition to the ban grew as the Reagan Administration, consumer groups, and retailers all urged Congress to let it lapse. Both opponents and supporters recognized that the ban hinged on semantics. A member of the Federal Reserve Board, which unanimously opposed the ban, testified about "the obvious difficulty in drawing a clear economic distinction between a permitted discount and a prohibited surcharge." *Cash Discount Act, 1981: Hearings on S. 414 Before the S. Banking Comm.*, 97th Cong. 9 (1981). "If you just change the wording a little bit, one becomes the other." *Id.* at 22. Because "the distinction is, at best, uncertain," many merchants had been forced to "throw[] up [their] hands in frustration" and steer clear of dual pricing altogether, because "compliance [was] simply not worth the merchant's risk or effort." *Id.* at 9. The Board thus proposed that Congress replace the ban with "a very simple rule": that both surcharges and discounts be allowed and "the availability of the discount or surcharge be disclosed to consumers." *Id.* at 10.

Every major consumer-advocacy group agreed. A Consumers Union representative testified that the surcharge-discount distinction "is merely one of semantics, and not of substance." *Id.* at 98. But "the semantic differences are significant," she added, because "the term 'surcharge' makes credit card customers particularly aware that they are paying an extra charge," whereas a discount "suggests that consumers are getting a bargain,

and downplays the truth." *Id.* The cost of credit is therefore best "expressed in the form of [a] surcharge." *Id.*[2]

The Federal Trade Commission likewise opposed the surcharge ban, explaining that although "a discount and a surcharge are equivalent concepts" in terms of the conduct they describe, "one is hidden in the cash price and the other is not," meaning that the surcharge ban prohibited merchants from disclosing to their customers the true cost of credit. *Cash Discount Act Hearings*, at 127. Like the Fed, the FTC supported "affirmatively allowing surcharges" and "requiring merchants to clearly disclose" the surcharge amount "in any advertisement" of their prices. *Id.* at 126-27.

On the other side of the debate, American Express and MasterCard "strongly" supported the ban, even though they too understood that, from a "mathematical viewpoint," "there is really no difference between a discount for cash and a surcharge for credit card use." *Cash Discount Act Hearings*, at 43, 55; *see* Krucoff, *When Cash Pays Off*, Wash. Post, Sept. 22, 1981 (quoting American Express spokesman stressing the "big psychological ... difference" between surcharges and dis-

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[2] "Removing the ban on surcharges," another consumer advocate testified, "is an important first step" to "disclos[ing] to consumers the full" cost of credit so they can "make informed judgments." *Cash Discount Act Hearings*, at 92; *see also* 127 Cong. Rec. S2093 ("Consumer Federation of America is totally and unequivocally opposed to the surcharge ban" because it "gives consumers incorrect signals about credit—making it appear to be free when it in fact has substantial costs."). Trade groups also believed that the ban "deceive[d] consumers about the true cost of credit." 127 Cong. Rec. S2093 ("[T]he consumer's right to be informed includes being informed of charges associated with his credit card purchases. The merchant should have the right if he so desires to pass the information along.").

counts). The big banks openly acknowledged their view that the surcharge label hurts their "good image," "makes a negative statement about the card to the consumer," and "talk[s] against the credit industry." *Cash Discount Act Hearings*, at 32, 60. As one banking lobbyist told Congress: A "surcharge creates a negative image of a card transaction," and a "card issuer's ability to create a favorable image for its product will be directly burdened by that negative image." *Id.* at 37-38.

Congress rejects a disclosure requirement. In 1981, Senators Glenn and Proxmire proposed adopting the Fed's disclosure plan. By its terms, their amendment would have allowed merchants to characterize the cost of credit as either a surcharge or a discount, while requiring that "such surcharge or discount [be] clearly and conspicuously disclosed to all prospective buyers." H.R. 31, 97th Cong., 127 Cong. Rec. S2083, S2089 (Mar. 12, 1981). "By allowing cash discounts and credit surcharges," Senator Glenn said, "our amendment will make consumers more aware of the actual cost of credit and hence better able to make informed choices." *Id.* at S2097; *see also id.* at S2101 (proposal would take the cost "out of hiding" and "label the surcharge so people know about it") (Sen. D'Amato); *id.* at S2102 (surcharge "presents users of a card with an explicit addition to the posted price, making the message clear") (Sen. Tsongas).

The Senate ultimately rejected the Fed's disclosure proposal by a 41-56 vote, *id.*, and Congress renewed the ban for three more years. Pub. L. No. 97-25, 95 Stat. 144 (1981). As renewed, the ban maintained the same definitions of "surcharge" and "discount." It also incorporated the Fed's definition of "regular price" as "the tag or posted price charged for the property or service if a single price is tagged or posted," or "the price charged for the property or service when payment is made by use of an open-end credit plan or a credit card if either (1) no

price is tagged or posted, or (2) two prices are tagged or posted." *Cash Discount Act Hearings*, at 5; *see* Pub. L. No. 97-25, § 102(a) (1981) (15 U.S.C. § 1602(y)).[3]

Congress lets federal surcharge ban lapse. But the Fed's definitions only exacerbated the widespread confusion among merchants. In 1984, as the ban was set to lapse, that confusion became central to the debate over the ban's future.[4]

The distinction between two labels for "fundamentally equivalent conduct," the Fed concluded, had "caused confusion among merchants about the difference be-

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[3] Although the Fed had introduced this definition four years earlier, 42 Fed. Reg. 38171, 38172-73 (July 27, 1977), even its drafters couldn't figure out how to apply it. When a gas station, confused about how to advertise its prices, sought guidance, the Fed acknowledged the difficulty of determining "what constitutes a tagged or posted price." 43 Fed. Reg. 3898, 3899 (Jan. 30, 1978). But it refused "to review for content" the "prototype designs of five signs" submitted by the station—explaining that this would be "tantamount to approving a disclosure form." *Id.* It ventured that, in this context, the "staff feels that when the credit card price for gasoline is clearly disclosed on the pump," signs and posters "may state the cash price without also disclosing the credit card price." *Id.*

[4] By 1984, the Fed had made several attempts to fine-tune its definitions of "surcharge," "discount," and "regular price." *See* 42 Fed. Reg. 780, 781 (Jan. 4, 1977); 42 Fed. Reg. 38171, 38173 (July 27, 1977); 45 Fed. Reg. 29702, 29736 (May 5, 1980); 45 Fed. Reg. 80648, 80696 (Dec. 5, 1980). But the confusion persisted. Senator Dodd opined that "many merchants are not sure what the difference between a discount and a surcharge is and thus do not offer different cash and credit prices for fear they will violate the ban on surcharges." Dodd, *Credit Card Surcharges*, N.Y. Times, Mar. 12, 1984 (letter to editor); *see* Krucoff, *When Cash Pays* ("[T]he regulations have been so complicated. Smaller business people, who are most likely to offer [discounts], may have been intimidated by the fear it could be viewed as an illegal surcharge.").

tween a permissible discount and an illegal surcharge—as evidenced by many inquiries the Board ha[d] received about the distinction." 70 Fed. Res. Bull. 309, 310-11 (Apr. 1984) (Nancy Teeters). In the Fed's view, such "uncertainty about the law" likely "discouraged merchants from offering discounts," out of fear that they could not comply. *Id.* at 311. The Fed thus reiterated its view that "merchants should be free to charge different prices without having to characterize the difference as a cash discount instead of a surcharge." *Id.*

The final federal fight over the surcharge ban split down well-established lines. Senator Proxmire cut to the chase: "Not one single consumer group supports the proposal to continue the ban on surcharges," he observed. "The nation's giant credit card companies want to perpetuate the myth that credit is free." Molotsky, *Extension of Credit Surcharge Ban*, N.Y. Times, Feb. 29, 1984. Conscious of the threat that surcharges would pose to their business model, card issuers responded by unleashing a massive lobbying campaign to oppose ending the ban. *Id.* American Express mailed millions of cardholders "an elaborate appeal urging them to send a card to their Congressman." Kitch, *The Framing Hypothesis*, at 217. It did not work. This time, Congress let the surcharge ban lapse for good, while leaving in place the original statutory protection for cash discounts. Engelberg, *Credit Card Surcharge Ban Ends*, N.Y. Times, Feb. 27, 1984.

D. The credit-card industry lobbies states to enact no-surcharge laws and adopts contractual no-surcharge rules

Sensing that Congress might not revive the ban, the industry also went to the statehouses. It convinced ten states—including the four most populous—to enact surcharge bans of their own. Most were adopted when it

appeared that the federal ban would not be renewed (in 1981) or shortly after it expired (in 1984). Pet. 10 n.1.

This time, the industry's lobbying was largely covert. To give the illusion of grassroots support, American Express and Visa went so far as to create and bankroll a fake consumer group called "Consumers Against Penalty Surcharges"—an early instance of the phenomenon now known as astroturfing. Memo from Kate Krell, July 24, 1987, *available at* http://bit.ly/2fLyUNB, at 3 (touting work of public-relations firm Hill & Knowlton in "put[ting] together 'Consumers Against Penalty Surcharges' for a coalition of credit card companies"). As with the federal ban, real consumer-advocacy groups opposed the legislation. In California, which considered legislation a year after New York, Consumers Union and Consumer Federation of America both told the legislature that no-surcharge laws inhibit transparency, thereby increasing costs and masking an enormous "invisible subsidy" from low-income cash consumers to high-income credit consumers. JA 63, 65.

Despite heated controversy at the federal level and in other states, the New York legislation passed quickly through Albany within months of the federal ban's expiration—with little debate or public notice, and virtually no opposition. JA 68. What little history there is suggests that the law was seen as a short-term measure "while extension of the Federal ban, which expired in February, is debated by Congress." JA 92. The retailers' lobby didn't oppose the bill, *id.*, and observed that "[f]ederal legislation to authorize surcharges on credit card purchases is being supported by the Consumer Federation of America, Consumers Union, the Federal Reserve Board, and the Federal Trade Commission." JA 96.

Sparse as it is, the New York legislative history does not hide that the ban's proponents aimed to influence

consumers' perceptions of credit cards by controlling the labels used to describe equivalent transactions. A memo justifying the state's support for the law declared: "Surcharges, *even if only psychologically, impose penalties* on purchasers" while a "cash discount, on the other hand, operates as an incentive and *encourages desired behavior*." JA 89 (emphasis added).

Enacted in June of 1984, New York's surcharge ban adopted the text of the federal ban verbatim. N.Y. Gen. Bus. Law § 518. But New York's statute differs in a few respects. First, "the New York legislature chose not to enact [the federal] definitional provisions." Pet. App. 71a. Second, although New York did not expressly permit discounts, the history shows that the intent was to allow merchants to "continue to offer discounts" for cash. JA 89. And, third, New York made violation of its ban a misdemeanor crime—punishable by fines, imprisonment, or both. N.Y. Gen. Bus. Law § 518.

Around the same time that state surcharge bans were enacted, credit-card companies also began including no-surcharge rules in their merchant contracts. The state laws thus function as a legislative extension of the restrictions imposed more overtly by contract.[5]

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[5] American Express's standard contract, for instance, has long contained an elaborate speech code: In a section entitled "treatment of the American Express brand," it provides that merchants may not "indicate or imply that they prefer, directly or indirectly, any Other Payment Products over our Card"; "try to dissuade Cardmembers from using the Card"; "criticize ... the Card or any of our services"; or "try to persuade or prompt Cardmembers to use ... any other method of payment." *American Express, Merchant Reference Guide–U.S.*, at 15 (Oct. 2016), http://bit.ly/2f2phsp.

E. Enforcement of New York's law

New York immediately began enforcing its surcharge ban against merchants. *See, e.g., State by Abrams v. Camera Warehouse, Inc.*, 496 N.Y.S.2d 659 (N.Y. Sup. Ct. 1985). In one early case, the state brought criminal charges against a gas-station owner who offered dual pricing and put up signs that "clearly stated the 'cash price' and the 'credit price' for his gasoline," which differed by five cents per gallon. *Fulvio*, 517 N.Y.S.2d at 1010. The owner was convicted because his cashier made the mistake of telling one customer that it cost "five cents extra" to use a credit card instead of saying that it would cost a "nickel less" to use cash. *Id.* at 1013. This conviction was short-lived, however: the court held that the law is unconstitutionally vague because it treats "precisely the same conduct ... either as a criminal offense or as lawfully permissible behavior, depending only upon the *label* the individual affixes to his economic behavior." *Id.* at 1011.

Fulvio may have temporarily dampened enforcement efforts, but it did not end them. In 2008 and 2009, the Attorney General brought a series of sweeps against more than fifty merchants, many of whom were targeted even though they clearly disclosed their prices, explaining that they charge a certain amount "more" to pay with credit. JA 98-100, 134-35, 137. The Attorney General's office told them that this explanation was illegal and gave specific instructions on how to describe their pricing schemes to customers. JA 107, 115. Two examples—based on uncontested record evidence—show how the law is enforced.

Parkside Fuel, a small heating-oil seller, informed customers of its credit-card surcharge "on the phone, at the same time that [it] informed them of [its] prices." JA 106. In 2009, someone from the Attorney General's office

called "pretending to be a customer ordering oil," and an employee "quoted the price of oil and said that [Parkside] charge[s] a fee on top of that price for using a credit card." *Id.* To the state, that was an illegal "surcharge." *Id.* The state told Parkside's owner that, to comply, he did not have to change any of the amounts that he charged; his employees simply had to "characteriz[e] the difference between paying with cash and paying with credit as a cash 'discount,' not a credit 'surcharge.'" JA 107.

The Assistant Attorney General even gave the owner "a script of what [he] could tell customers when talking to them over the phone." *Id.* He "could quote the price [of heating oil] as $3.50/gallon, for example, and then explain to customers that they would receive a $.05/gallon 'discount' for paying with cash," but he "could not quote the price as $3.45/gallon while explaining that they would have to pay a $.05/gallon 'surcharge' to use a credit card." *Id.* Parkside tried following the script for a bit, but customers found it "confusing," and it was "not the message that [Parkside] meant to convey." *Id.* So Parkside gave up on dual pricing entirely. *Id.*

In a similar case—involving another merchant that clearly disclosed its prices over the phone—an Assistant Attorney General said: "You can charge more for a credit card all you want, but you have to say that this is the cash discount rate." JA 115. The company's employees "had been saying that 'it is a quarter more a gallon,'" and they "were not allowed to say that." *Id.*

By contrast, the Attorney General's office does not rely on § 518 when merchants engage in bait-and-switch tactics. For example, it sent a cease-and-desist letter in 2011 to a gas station that had "been posting gasoline prices which, in small print, are limited to cash sales only." JA 144. The letter explained that "[t]he roadside

listing of a price without equally prominent disclosure of the higher standard price for credit purchases violates" two false-advertising statutes. *Id.* The letter made no mention of the no-surcharge law.

F. Enforcement in other states

More recently, at least two states have used their no-surcharge laws to target merchants' speech after the credit-card networks rescinded their contractual rules in 2013. Texas, for example, sent a cease-and-desist letter to one small merchant because he "tells customers if paying with credit card its [sic] 3% more." R. 294 in *Rowell v. Pettijohn*, 15-50168 (5th Cir.). Saying "less" for cash, by contrast, would have been legal. *Id.* at 259.

Florida's Attorney General also sent a series of cease-and-desist letters to merchants throughout the state, including the husband-and-wife owners of Dana's Railroad Supply—a model-railroad and hobby shop—whose only crime was "posting a sign indicating that its customers would be subject to a fee for using credit cards," instead of expressing the same price difference as a "discount." *Dana's R.R.*, 807 F.3d at 1239.

G. The Durbin Amendment and the recent political controversy over swipe fees

Meanwhile, the push for financial reform in the aftermath of the 2008 crisis brought a renewed focus on swipe fees. Senator Durbin proposed an amendment to the Dodd-Frank Wall Street Reform Act that would have given the Fed authority to regulate credit-card fees. 156 Cong. Rec. S3588 (May 12, 2010). This proposal touched off yet another contentious political debate between retailers and card issuers. Carter & Grim, *Swiped: Banks, Merchants and Why Washington Doesn't Work for You*, Huffington Post, Apr. 28, 2011. Many merchants conveyed their opposition to swipe fees directly to their customers—and voters—at the checkout counter. Fran-

chisees of the 7-Eleven chain, for example, put up signs asking customers to "STOP UNFAIR CREDIT CARD FEES." Morrison, *7-Eleven Claims Millions of Interchange Signatures*, Credit Union Times, Sept. 28, 2009. And they gathered 1.6 million signatures on a petition to support the proposed legislation—a figure the company claimed represented the largest quantity of signatures ever presented to Congress, trumping even the 1.3 million presented to Congress regarding healthcare reform. *Id.* 7-Eleven's franchisees saw the petition drive as an opportunity to educate their customers. "People don't know about these fees and they are shocked," explained one franchisee. Price & Stratford, *Store Owner Takes Petition to Congress*, Fla. Today, Sept. 29, 2009.

III. This litigation

A. The petitioners

In June 2013, not long after the credit-card companies dropped their contractual rules, five New York merchants (and their principals) filed this suit. Although their circumstances differ slightly, they all want the same thing: to truthfully tell their customers that there is an "additional fee" or "surcharge" for using credit.

One petitioner, Expressions Hair Design, prominently posted a sign informing its customers that it would charge 3% "more" to pay for a haircut with a credit card. JA 60. But the salon took down the sign after learning of New York's law. JA 61. It now tells customers that it has two prices—a lower price for cash, a higher one for credit. *Id.* It tries "to be as careful as [it] can to avoid characterizing that price difference as a 'surcharge' or an 'extra' charge for paying with a credit card." *Id.* Because of the law, Expressions cannot communicate its prices how it would like—by calling the difference a "surcharge." *Id.*

Like Expressions, the four other petitioners—Brooklyn Farmacy & Soda Fountain, Brite Buy Wines & Spirits, Five Points Academy, and Patio.com—want to charge two different prices and to call the difference a "surcharge" for credit. JA 43, 47, 51, 57. They do not offer cash discounts because they believe that "[l]abeling the difference as a 'discount' ... would not be nearly as effective as calling it a 'surcharge.'" JA 52.

The merchants are also concerned about the difficulty of complying with state law. Brooklyn Farmacy, for instance, is "not willing to take the risk that [it] might be prosecuted by the state simply for conveying truthful information to [its] customers about the higher cost of using a credit card." JA 53. The other merchants likewise worry that they could accidentally subject themselves to criminal liability if an employee makes "the mistake of telling customers"—truthfully—"that they are paying more for using credit cards." JA 58.

B. Procedural history

1. ***The state's position in the district court.*** At an initial hearing, the state articulated its interpretation of the statute in a colloquy with Judge Rakoff:

> THE STATE: [W]e think [the statute] gives the plaintiffs and all other reasonable people notice of what is lawful and what is unlawful.
>
> THE COURT: So the statute allows ... merchants to offer discounts for using cash or a debit card, but makes it a criminal offense to impose surcharges for using a credit card. What's the difference?
>
> THE STATE: We don't think there is a difference in terms of the underlying economic value. The way our office interprets the statute is that it doesn't—we are going after merchants who

> entice consumers to commence an economic transaction by advertising one price and then, once they arrive at the register, informing them when they pull out their credit card that they are going to be subject to a surcharge above and beyond that[.]
>
> THE COURT: So you are interpreting [it as] a false advertising statute.
>
> THE STATE: Essentially, yes, that's how our office enforces it.
>
> THE COURT: Does the statute say that?
>
> THE STATE: We think the statute doesn't give notice of that on its face, but ... we think that's the most reasonable interpretation of it.

Dist. Ct. Hearing Tr. 6/14/13, at 5-6.

The state took the same position in its briefs, insisting that the statute does not prohibit surcharges but is instead "an anti-fraud statute" that bars only the imposition of "additional hidden fee[s]." Dist. Ct. Dkt. 27, at 21, 39. On this false-advertising-only reading, the statute actually *authorizes* merchants to say that they are imposing credit-card surcharges, so long as they do not do so deceptively. The state argued that the statute—when "properly interpreted" as being "directed at misleading commercial speech"—"regulates *conduct*, not speech." Dist. Ct. Dkt. 27, at 36, 39; *see also id.* at 3.

The state's district-court briefing did not attempt to defend the surcharge ban as a surcharge ban. Instead, it maintained that the law, as a flat surcharge ban, would be "untenable" and "illogical" (*id.* at 2, 3, 19, 21 n.6, 32, 40, 41, 42, 45; Dist. Ct. Dkt. 51, at 7, 8 n.7) and "would not serve the State's anti-deception interest" because liability "would turn solely on the label that a seller used to describe its dual pricing scheme." Dist. Ct. Dkt. 27, at 24.

The state elected not to introduce any evidence to carry its burden to withstand First Amendment scrutiny under *Central Hudson Gas & Electric Corp., Inc. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

2. *The district court's decision.* The court was unpersuaded by the state's arguments. Pet. App. 55a. It found the state's interpretation "rather convoluted" and at odds with "the plain text of section 518," which "simply bans 'surcharges.'" *Id.* at 69a. "This, on its face, chills any retailer from characterizing its prices as including a surcharge." *Id.* at 69a-70a. The state's reading was also "fatal[ly]" undermined by its "actual history of prosecution." *Id.* at 70a-72a.

Having rejected the state's false-advertising theory, the court "easily conclude[d]" that the law violates the First Amendment and is impermissibly vague. *Id.* at 75a n.8. The court held that, "even as defendants read it, section 518 plainly regulates speech" because it "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." *Id.* at 73a. The law's "virtually incomprehensible distinction between what a vendor can and cannot tell its customers offends the First Amendment." *Id.* at 56a.

The court noted that the state's "suggestion to the contrary"—that the law regulates conduct because it only "'affects *how* [merchants] may communicate'" dual-pricing schemes, not pricing itself—"turns the speech-conduct distinction on its head." *Id.* at 73a. "Pricing is a routine subject of economic regulation," the court explained, "but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment." *Id.* at 74a. The court next concluded that the law "cannot pass

muster" under the *Central Hudson* test for commercial-speech restrictions. *Id.* at 75a.

Finally, the court had "little difficulty concluding" that the law is unconstitutionally vague. *Id.* at 80a. It noted that the state had made "no attempt to defend the statute" if read as a surcharge ban rather than a disclosure law, "conceding that it is 'untenable'" on that interpretation—a concession that was "well taken." *Id.*

3. ***The state's position in the court of appeals.*** After stipulating to an order permanently enjoining the state from enforcing the law against the plaintiffs, *id.* at 48a, the state appealed. On appeal, the state abandoned its false-advertising interpretation and instead defended the law as conventionally interpreted—as banning "surcharges" but permitting "discounts." This "surcharge prohibition," the state argued, "is a direct pricing regulation that does not restrict plaintiffs' speech." NY CA2 Br. 24. The state made no attempt to reconcile this position with its diametrically opposite position in the district court—that the law, as interpreted in this way, "would turn solely on the label that a seller used to describe its dual pricing scheme." Dist. Ct. Dkt. 27, at 24. Because the state had made no record below, the state's appellate brief cited only "economic literature" and newspaper articles to justify the law. NY CA2 Br. 6-10.

4. ***The Second Circuit's decision.*** The court held that New York's law "regulates conduct, not speech." Pet. App. 27a. Though no party suggested it, the court divided the challenge into "two distinct kinds" of dual pricing. *Id.* at 15a. The first concerned "post[ing] only a single price" on the label, while communicating the surcharge amount through a separate sign (*e.g.*, "3% credit-card surcharge"). *Id.* The second was a scheme in which a merchant "posts two different prices" on the label and

"characterize[s] this price differential as a 'surcharge'" (or as costing "more"). *Id.* at 16a.

"As applied to single-sticker-price schemes," the court upheld the law as a regulation of conduct. *Id.* at 18a. It determined that the merchant's decision of which price to frame as the "regular" price on the "sticker," and which to convey through a separate sign, was not "a communicative act." *Id.* at 25a. "[F]or essentially the same reasons," the court held that the law is not unconstitutionally vague. *Id.* at 41a.

Turning to the second part—whether the law unconstitutionally prohibits merchants from posting two different prices for each product and characterizing the difference as a credit "surcharge"—the court declined to "reach the merits" and instead chose to abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) (a course the state had not even requested). Pet. App. 28a. Disregarding the law's enforcement history and the state's inconsistent interpretations, the court concluded that "[i]t is far from clear that Section 518 prohibits the relevant conduct." *Id.* at 31a. For this reason—the law's lack of clarity—the court abstained from this aspect of petitioners' vagueness challenge as well. *Id.* at 45a.

SUMMARY OF ARGUMENT

I.A. The First Amendment protects the marketplace of ideas as well as ideas in the marketplace—even if the idea "is simply this: 'I will sell you the X [product] at the Y price.'" *Va. State Bd.*, 425 U.S. at 761. Protecting truthful "price information" promotes "intelligent and well informed" decisions—both about the market and how it "ought to be regulated"—and is thus "indispensible" to "a free enterprise system" and "to enlighten[ed] public decisionmaking in a democracy." *Id.* at 765.

New York's no-surcharge law is at war with these principles. It regulates speech, not conduct, because it restricts only what merchants may say about their prices, not what they may charge. Its "purpose and practical effect" make this clear. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011). Its effect is to criminalize truthful speech conveying price information. And its purpose is to control "the reactions it is assumed people will have to the free flow of [that] information" by keeping them "in ignorance" of the cost of credit. *Va. State Bd.*, 425 U.S. at 769. A state may not try to "alter [consumer] decisions" by banning the most "effective and informative way" of conveying information—at least not without satisfying First Amendment scrutiny. *Sorrell*, 564 U.S. at 564, 576.

B. This law dissolves upon scrutiny. It flunks the *Central Hudson* test that the Court traditionally applies to commercial-speech restrictions: The law doesn't directly advance any interest in consumer welfare. It is shot through with exceptions and inconsistencies that undermine the credibility of any such aim—including exemptions for state agencies. And it is far broader than necessary to address a risk of deception, which is prohibited by false-advertising laws anyway and could be addressed by a disclosure requirement like Minnesota's, which expressly permits surcharges if conspicuously disclosed. Minn. Stat. § 325G.051(1)(a)(1) (2015).

II. The law's First Amendment problems are made worse by its vagueness. It does not clearly define the line between a permissible "discount" and a mathematically equivalent but criminal "surcharge." Although the Second Circuit used the law's vagueness against the petitioners by invoking *Pullman* abstention, plaintiffs asserting free-speech rights "have a special interest in obtaining a prompt adjudication of their rights, despite potential ambiguities of state law." *Sorrell*, 564 U.S. at 563. New York's law is so vague that the Attorney Gen-

eral's lawyers—in this very litigation—have been unable to maintain a consistent party line about what the law means. "For the State to change its position is particularly troubling in a First Amendment case." *Id.* As a result, the petitioners are faced with an unenviable choice: operate in constant fear of inadvertently describing legal dual-pricing conduct in a criminal way, or refrain from dual pricing altogether. The Constitution prevents that "chilling effect on free speech." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997).

ARGUMENT

I. New York's No-Surcharge Law Violates the First Amendment.

A. Because New York's law keeps consumers in the dark by criminalizing truthful speech, it is subject to First Amendment scrutiny.

This Court has long held that the dissemination of "price information"—"information as to who is producing and selling what product, for what reason, and at what price"—is "protected by the First Amendment." *Va. State Bd.*, 425 U.S. at 765, 770. The "free flow" of this information "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977). Laws that seek "to deprive consumers of accurate information" about prices are thus constitutionally suspect, and must withstand First Amendment scrutiny. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (plurality).

New York's surcharge ban is such a law. Although the statute may "on its face appear[] neutral," its "purpose and practical effect" are to criminalize truthful, non-misleading speech that best informs consumers

about the cost of credit cards. *Sorrell*, 564 U.S. at 566. By allowing merchants to express the cost of credit only in the least effective way—as a "discount" for cash, not a "surcharge" for credit—the law "keep[s] the public in ignorance" of the true costs of credit. *Va. State Bd.*, 425 U.S. at 770. And that is all that it does. It thus "imposes more than an incidental burden on protected expression," and is subject to scrutiny. *Sorrell*, 564 U.S. at 567.

Practical effect. New York's law does not in any way regulate what merchants may *do*: They are allowed to charge different prices depending on whether a customer pays with cash or credit, and to set those prices as they wish. All that the law regulates is what merchants may *say*: Framing the price difference as a cash discount is favored; framing it as a credit surcharge is verboten. "After all," as the Eleventh Circuit observed, "what is a surcharge but a negative discount? If the same copy of Plato's *Republic* can be had for $30 in cash or $32 by credit card, absent any communication from the seller, does the customer incur a $2 *surcharge* or does he receive a $2 *discount*? Questions of metaphysics aside, there is no real-world difference between the two formulations," making the law "a restriction on speech, not a regulation of conduct." *Dana's R.R.*, 807 F.3d at 1245.

The enforcement history bears that out. In the first reported criminal prosecution, a gas-station owner was convicted because his cashier truthfully informed a customer that it cost "five cents 'extra'" to use credit rather than saying that it was a "nickel less" to use cash. *Fulvio*, 517 N.Y.S.2d at 1013. The state court set aside the conviction as constitutionally "intolerable," observing that "it is not the *act* which is outlawed, but the *word* given that act." *Id.* at 1015. Under this law, "precisely the same conduct by an individual may be treated either

as a criminal offense or as lawfully permissible behavior, depending only upon the *label* the individual affixes to his economic behavior." *Id.* at 1011.

The state's continued enforcement efforts confirm that the law regulates speech. A few years back, the state targeted dozens of merchants who had described their prices in the wrong way. JA 105-33. The Attorney General's office told one merchant that, to comply with the law, he need not change the amounts he actually charges consumers, but must simply "characteriz[e] the difference" between the cash and credit prices "as a cash 'discount,' not a credit 'surcharge.'" JA 107. The state told other merchants the same. *See, e.g.*, JA 115 ("You can charge more for a credit card all you want, but you have to say that this is the cash discount rate."). The state even gave sellers "a script of what [they] could tell customers." JA 107. Merchants who do not follow this script could be deemed criminals in the eyes of the state—even though the amounts they charge consumers are perfectly lawful, and prominently disclosed.

As these real-world examples illustrate, the law makes liability turn on the speech used to describe identical conduct—not the conduct itself. A non-complying merchant can bring herself into compliance by changing the way that she frames or communicates her prices to customers, without changing the prices themselves—a fact the state acknowledged in its briefing below. *See* Dist. Ct. Dkt. 27, at 37 ("It is true that if sellers want to use dual pricing, § 518 affects *how* they may communicate it," but "sellers are free to set the credit card price at whatever level they wish."). The Second Circuit was thus fundamentally mistaken when it concluded that New York's no-surcharge law "regulates conduct, not

speech." Pet. App. 27a. To the contrary, this law "targets expression alone." *Dana's R.R.*, 807 F.3d at 1245.[6]

The law's practical effect is thus undeniable: It criminalizes the dissemination of truthful, non-misleading price information, demanding one way of framing dual pricing over another. And the state's favored framing is not "nearly as effective" at drawing attention to the cost of credit—the very message petitioners wish to convey, JA 52—but instead serves to mask that cost.

Purpose. That was also its purpose. When New York enacted the law, it sought to fill the gap left by the federal ban's expiration. That ban had lasted for several years thanks to intense lobbying by credit-card companies, which objected to allowing the cost of credit to be conveyed as a surcharge because that would "talk against the credit industry." *Cash Discount Act Hearings*, at 60. Those who opposed the ban, like the Fed and the consumer groups, also understood that it was aimed only at "wording" and "semantics." *Id.* at 22, 98. They under-

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[6] The surcharge ban diminishes the effectiveness of merchants' speech in another way. Although petitioners wish to inform customers of the cost of credit before they make their purchases, petitioners also seek to highlight that cost again after a person has made the decision to pay by credit, by listing the price difference on the receipt—"the forum most likely to capture [their] attention" once they've paid. *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 505 (6th Cir. 2008) (Sutton, J.); *see* JA 56. Listing the cost of credit on the receipts of only those customers who pay in cash (through a discount) is ineffective because those customers are *already using cash*. Those who use credit, however—the target audience—are kept "in the dark." *Id.*; *see* Horkovich, *The Cash Discount Act: More Than Just a Matter of Semantics?*, 8 U. Dayton L. Rev. 137, 154 (1982) ("If the merchant offers [a] discount, the credit customer may not fully appreciate the consequential impact on his true cost of credit or may not be able to make an informed choice.").

stood too that "the semantic differences are significant" because "the term 'surcharge' makes credit card customers particularly aware that they are paying an extra charge," while the discount label "suggests that consumers are getting a bargain, and downplays the truth." *Id.* at 98.

New York understood this as well. The state openly justified the law based on the different psychological effects that the two words have on consumers' understanding and behavior: "Surcharges, *even if only psychologically*, impose penalties on purchasers.... A cash discount, on the other hand, operates as an incentive and *encourages desired behavior*." JA 89 (emphasis added). And the Attorney General embraces this behavioral effect in this litigation, defending the law on the ground that surcharges cause "anger" and "make consumers unhappy because customers view [them] as unjustified penalties." NY CA2 Br. 9.

But that's exactly the point. A behavioral effect that "depend[s] on mental intermediation," like the effect of one label versus another, just "demonstrates the power" of speech. *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). The surcharge ban can produce its intended behavioral effect "only through the reactions it is assumed people will have to the free flow of [credit-card] price information." *Va. State Bd.*, 425 U.S. at 769. In the context of credit cards, this effect is well recognized: "Because of the framing effect, surcharges are far more effective than discounts at signaling to consumers the relative costs of a payment system." Levitin, *Priceless?*, 55 UCLA L. Rev. at 1352. States, however, may not pass laws that seek to "diminish the effectiveness" of truthful, non-misleading communication because the state has

determined that it is "too persuasive," or "because of disagreement with the message it conveys." *Sorrell*, 564 U.S. at 565-66, 580. A law that works to prevent merchants "from communicating with [consumers] in an effective and informative manner," thereby "diminishing [their] ability to influence [consumer] decisions," must satisfy First Amendment scrutiny. *Id.* at 564, 577.[7]

"Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects," *id.* at 577, so this Court is "especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good," *44 Liquormart*, 517 U.S. at 503 (plurality). That is so whether the regulation restricts "price information," *Va. State Bd.*, 425 U.S. at 770, or even "information on beer labels," *Rubin*, 514 U.S. at 481-82. Fear that "the public will respond 'irrationally' to the truth," *44 Liquormart*, 517 U.S. at 503 (plurality), or "make bad decisions if given truthful information," *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002), is no justification for criminalizing speech. Rather than decree such a "highly paternalistic approach," states must "assume that [accurate pricing] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is

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[7] Some Justices have expressed the view that such laws are always unconstitutional. *See 44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring) ("[When] the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," that "is *per se* illegitimate."); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) ("[T]he Government's asserted interest, that consumers should be misled or uninformed for their own protection, does not suffice to justify restrictions on protected speech in *any* context.").

to open the channels of communication rather than to close them." *Va. State Bd.*, 425 U.S. at 770.

And yet New York's surcharge ban doesn't even have paternalism on its side. Instead, the state is "giv[ing] one side" of a contentious debate—the credit-card industry—"an advantage" by muzzling merchants. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978). In this way, New York's law "goes even beyond mere content discrimination, to actual viewpoint discrimination." *Sorrell*, 564 U.S. at 565. And a law criminalizing merchants' efforts to tell their side of the story about the cost of credit cannot possibly be squared with the original purpose of commercial-speech protection: to ensure that consumers can make "intelligent and well informed" marketplace decisions. *Va. State Bd.*, 425 U.S. at 765.

To that end, merchants have a right to inform consumers *why* credit is expensive—"for what reason" they charge more for using a credit card, "and at what price"—and consumers have a "reciprocal right to receive" that information. *Id.* at 757, 764. Merchants also have a right to combat the advertising message conveyed by the credit-card industry: that credit is "priceless." As one credit-card industry lobbyist complained during consideration of the federal ban: "A card issuer spends substantial time and money in developing a good image for its products. The surcharge imposed by a merchant makes a negative statement about the card to the consumer. The card issuer's ability to create a favorable image for its product will be directly burdened by that negative image." *Cash Discount Act Hearings*, at 37; *see also* AdAge Insights, *Financial Services Marketing* 7 (2012) (noting $1.61 billion spent on credit-card advertising in 2011). Merchants have a right to make this "negative statement," and consumers have a right to receive it.

These rights serve a deeper purpose. "[U]nless consumers are kept informed about the operations of the free market system, they cannot form 'intelligent opinions as to how that system ought to be regulated or altered.'" *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring) (quoting *Va. State Bd.*, 425 U.S. at 765). In this way, "commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy." *Id.* at 503 (plurality). That is certainly true with respect to the surcharge ban. Although the petitioners wish to frame the cost of credit as a surcharge so that consumers make better decisions in the short run, "what is going on here is more than just a debate about how best to sell toothpaste." *BellSouth*, 542 F.3d at 505. "Given current debates over swipe fees and financial regulation more generally," the petitioners also want to convey information to aid efforts to reform the market—a concern, the district court recognized, that has a "powerful noncommercial valence." Pet. App. 76a; *see* JA 60 ("If we can do our part to educate people about swipe fees, we are hopeful that they will act on that information—both as consumers and as citizens.").

By adopting the credit-card industry's speech code, the surcharge ban "facilitates keeping consumers (and voters) in the dark" about the cost of credit "and its impact on their wallets." *BellSouth*, 542 F.3d at 505. Because the law criminalizes merchants' most effective way of fighting back—their attempt to bring the cost of credit into the light—it is subject to First Amendment scrutiny, which it cannot survive.

* * *

Before turning to that question, however, we pause to emphasize what this case is *not* about: This is not a case about "*Lochner*-ization." Some Justices have expressed

deep concern about the possibility that the First Amendment will cast a cloud over "ordinary regulatory practices that may only incidentally affect a commercial message," perhaps even returning us "to the bygone era of *Lochner v. New York*, 198 U.S. 45 (1905)." *Sorrell*, 564 U.S. at 585, 602-03 (Breyer, J., dissenting). This case does not implicate that concern. As New York concedes, "few if any additional state laws are likely to be affected" by this Court's decision, which may not "have much impact outside the context of credit-card surcharges." BIO 15. And, even within that context, the impact is limited to speech restrictions. If New York decides tomorrow that it wants to regulate the amounts merchants charge for cash versus credit, or eliminate dual pricing altogether, the First Amendment will not stand in its way. This case in no way threatens the bedrock proposition that states have broad authority to regulate economic conduct, unencumbered by the First Amendment.

The only proposition this Court need endorse here is that the choice of how best to label dual pricing—without altering the amounts charged—is a choice about *communication*, not conduct. As the district court put it: "Pricing is a routine subject of economic regulation, but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment." Pet. App. 74a. That was as true forty years ago as it is today. *See Va. State Bd.*, 425 U.S. at 765; *Motor Vehicle Mfrs. Ass'n v. Abrams*, 684 F. Supp. 804, 805 (S.D.N.Y. 1988) (striking down New York statute prohibiting companies from "impos[ing]" a "surcharge" on auto sales "to reflect the increased cost" of compliance, even though it was legal to pass that cost onto consumers). This Court can easily strike down the no-surcharge law without expanding the category of laws subject to First Amendment scrutiny,

or adopting a more "unforgiving brand" of heightened scrutiny than what has traditionally been applied to commercial-speech restrictions, *Sorrell*, 564 U.S. at 592 (Breyer, J., dissenting), or treating New York's law as a content-based speech restriction that is "automatically subject to strict scrutiny," *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2236 (2015) (Kagan, J., concurring).

If this case harkens back to any of this Court's 20th-century cases, it is *Virginia State Board*—not *Lochner*. That is because New York's surcharge ban achieves its effect by criminalizing the most powerful way of informing consumers of the cost of a widely used product. Such a law is antithetical to a free marketplace—in both a metaphorical and literal sense—and defies this Court's long-held understanding of the First Amendment.

B. The no-surcharge law cannot survive even intermediate scrutiny.

Laws restricting commercial speech must, at a minimum, withstand intermediate scrutiny under the *Central Hudson* test, which asks four questions: (1) whether the speech "concern[s] lawful activity and [is] not ... misleading"; (2) "whether the asserted governmental interest" justifying the law "is substantial"; (3) "whether the regulation directly advances the governmental interest asserted"; and (4) whether the challenged law "is not more extensive than is necessary to serve that interest." 447 U.S. at 566. In applying this test, courts "must review the [state's law] with 'special care,' mindful that speech prohibitions of this type rarely survive constitutional review." *44 Liquormart*, 517 U.S. at 504 (plurality). The state's burden is "heavy," *id.* at 516, and requires actual evidence—not just "speculation or conjecture"—that each factor is satisfied, *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). The state cannot meet its burden here.

1. Dual pricing is legal, and labeling the price difference as a "surcharge" is not inherently misleading.

Dual pricing based on whether consumers pay with cash or credit is lawful. So speech that frames the price difference in the way that best explains "the reason[] for [it] does not advance an illegal transaction." *BellSouth*, 542 F.3d at 506. Nor is it "inherently misleading." *In re R.M.J.*, 455 U.S. 191, 203 (1982); *see Dana's R.R.*, 807 F.3d at 1249 ("Calling the additional fee paid by a credit-card user a *surcharge* rather than a *discount* is no more misleading than is calling the temperature *warmer* in Savannah rather than *colder* in Escanaba."). To the contrary, as the district court found, surcharges "actually make consumers more informed rather than less" by "truthfully and effectively conveying the true cost of using credit cards." Pet. App. 76a. That speech is squarely within *Central Hudson*'s protection.

2. The state has no legitimate interest in obscuring the cost of credit-card transactions from consumers.

Because the state has no legitimate interest in keeping consumers in the dark about the cost of credit, it cannot satisfy the second *Central Hudson* prong. "Unlike rational-basis review, the *Central Hudson* standard does not permit [courts] to supplant the precise interests put forward by the State with other suppositions," or to "turn away if it appears that the stated interests are not the actual interests served by the restriction." *Edenfield*, 507 U.S. at 768. The Court's analysis, therefore, must be confined to interests actually offered by the state.

On its face, the no-surcharge law articulates no state interest, and the legislative history fails to make up for this deficiency. The memorandum introducing the bill

indicates that it sought to prevent a situation where "two price scales would exist for the merchant who would advertise a certain price and, at the time of the sale, raise or lower the price according to the method of payment," subjecting consumers to "dubious marketing practices and variable purchase prices." JA 81. But "two price scales" *are* permitted—the law regulates only how they are communicated—and the legislative history never explains how "variable purchase prices" could be harmful or what is "dubious" about truthfully conveying the higher cost as a surcharge on top of the posted price.

Attempting to fill the void, the Attorney General has offered three justifications in this litigation. One: that "customers view [credit] surcharges as unjustified penalties," which "can cause consumer anger and 'dampen retail sales,'" while "customers view cash discounts more positively," which can "encourage consumer spending," NY CA2 Br. 9, 11. Two: that "surcharges are much more strongly associated than discounts are with 'dubious' and fraudulent sales practices" because they "make it easier for sellers to advertise a low regular price and then impose surprise credit-card fees at the point of sale." *Id.* at 9-10, 43. Three: that "sellers can and often will use surcharges to extract windfall profits." *Id.* at 6.

The first asserted justification (faux paternalism) is not a legitimate reason for banning truthful speech. *Va. State Bd.*, 425 U.S. at 769-70. Even if "some regulations of statements about [the cost of credit] that *increase* consumer awareness would be entirely proper, this statutory provision is nothing more than an attempt to blindfold the public" and enshrine "a policy of consumer ignorance, at the expense of the free-speech rights of the sellers and purchasers." *Rubin*, 514 U.S. at 498 (Stevens, J., concurring). That is impermissible.

The second and third asserted justifications (preventing deception and price gouging) are at best hypothetical concerns. A state "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" before taking the radical step of banning "truthful and nonmisleading expression." *Edenfield*, 507 U.S. at 768-69, 771. "[A]necdotal evidence and educated guesses" are not enough. *Rubin*, 514 U.S. at 490. But here, New York offered nothing, leaving the state's appellate lawyers to string together cites from "economic literature" and newspaper articles in an attempt to claim a justification that could qualify as substantial. NY CA2 Br. 6-10.

3. The no-surcharge law does not directly advance any legitimate state interest.

Even overlooking the state's failure to substantiate its purported interests in preventing deception and price gouging, those interests cannot "overcome the irrationality of the regulatory scheme and the weight of the record," *Rubin*, 514 U.S. at 490, and so cannot justify the ban under *Central Hudson*. The third prong requires the state to show that the law directly advances its asserted interest—that is, that the government's means and ends align. *Edenfield*, 507 U.S. at 771. Here, too, New York's law comes up short: It does not directly advance either an anti-deception interest or an anti-gouging interest.

Start with deception. If New York were really concerned about preventing hidden costs then it could allow merchants to highlight the extra cost of credit by labeling it a "surcharge" and insist that it be prominently disclosed to consumers, much like Minnesota does, *see* Minn. Stat. § 325G.051(1)(a), or as the Federal Reserve Board and the Federal Trade Commission proposed in the early 1980s. Instead, the state requires merchants to

communicate the additional cost in the way that best conceals it. As the district court observed, that requirement only "perpetuates consumer confusion by preventing sellers from using the most effective means at their disposal to educate consumers about the true costs of credit-card usage." Pet. App. 77a. "It would be perverse," the court continued, "to conclude that a statute that keeps consumers in the dark about avoidable additional costs somehow 'directly advances' the goal of preventing consumer deception." *Id.*

The state acknowledged as much in its district-court briefing. In arguing for its erstwhile false-advertising construction, the state conceded that the law as conventionally interpreted—as a surcharge ban—"would not serve the State's anti-deception interest," for liability "would turn solely on the label that a seller used to describe its dual pricing scheme—not whether that scheme was adequately disclosed to consumers." Dist. Ct. Dkt. 27, at 24.

The law is also riddled with "exemptions and inconsistencies [that] bring into question the purpose of the labeling ban." *Rubin*, 514 U.S. at 489. For one thing, the state exempts *itself* and certain "favored utilities" from the law's prohibition. Pet. App. 77a. It expressly authorizes surcharges, "administrative fees," or "convenience fees" for payments made to (among others) the court system, N.Y. Crim. Proc. Law §§ 420.05, 520.10(1)(i); the Water Board, N.Y. Pub. Auth. Law § 1045-j(4-a)(b); and the State Department of Taxation and Finance. *See* N.Y. State Dep't of Taxation and Finance, *Pay personal income tax by Credit Card*, http://on.ny.gov/2fFKBkO. Yet the law doesn't specifically require that surcharges imposed by the state be prominently disclosed to consumers. The state's self-serving exemptions defeat any inter-

est that it might claim in preventing deception. New York can "present[] no convincing reason for pegging its speech ban to the identity" of the speaker, allowing certain favored entities to use the "surcharge" label while banning its use by others. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 191 (1999).

And although the state "express[es] concern for consumers who may be lured into a transaction they can't complete without incurring additional unannounced charges," the ban "applies to only one particular type of additional charge: credit-card surcharges." Pet. App. 77a. Thus, as the district court put it, the law "does not actually ensure that the most prominently displayed price consumers encounter will reflect the highest price they will have to pay, since handling charges, shipping costs, service fees, processing fees, 'suggested tips,' and any number of other types of additional charges—which consumers may or may not be able to take steps to avoid—may still be added on top." *Id.*

The state's asserted anti-gouging interest fares no better. The law permits a merchant, for instance, to charge $100 for a product if paying in cash and $200 if paying with credit—but only if the difference is framed as a cash discount. This Court has consistently found that bans "target[ing] truthful, nonmisleading commercial messages rarely protect consumers" from "commercial harms." *44 Liquormart*, 517 U.S. at 502-04 (plurality). The surcharge ban is no exception.

4. The no-surcharge law is far more extensive than necessary to serve any legitimate state interest.

The state's biggest problem, however, is that the surcharge ban is far broader than necessary to achieve its purported goals, thus failing the final *Central Hudson*

prong. "[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993); *see Rubin*, 514 U.S. at 491 (explaining that unconstitutionality is "highlighted by the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech"). "The ready availability of such alternatives"—many of "which would far more effectively achieve" the state's "professed goal" of preventing deception and gouging—"demonstrates that the fit between ends and means is not narrowly tailored." *44 Liquormart*, 530 U.S. at 530 (O'Connor, J., concurring).

With respect to deception: We agree, of course, that merchants should not impose an undisclosed surcharge or surprise consumers by waiting until the point of sale to inform them of the surcharge. But the state did not need to enact a new law to prevent that sort of deception. As the district court explained, "New York already has laws on the books prohibiting false advertising and deceptive acts and practices." Pet. App. 78a-79a; *see* N.Y. Gen. Bus. Law § 349; *id.* § 350 & 350-a. Because the state could address any legitimate concern about consumer deception simply by enforcing its own existing laws, the no-surcharge law is unnecessary. *See BellSouth*, 542 F.3d at 508 ("Even granting the Commonwealth's assumption that [consumer deception] was a potential problem, ... why not first enforce existing state law on the point?"). And the state has done just that, demanding that merchants who have engaged in bait-and-switch tactics comply with two false-advertising laws—but making no mention of the surcharge ban. JA 144.

Even if those laws were not already on the books, the ban would still sweep too broadly. "States may not place an absolute prohibition" on information that is merely "potentially misleading ... if the information also may be presented in a way that is not deceptive." *R.M.J.*, 455 U.S. at 203. If the state were truly worried about consumers being misled by undisclosed surcharges, it could solve that problem by requiring clear disclosure. *See* Minn. Stat. § 325G.051(1)(a). That would accomplish the state's purported aim without "involv[ing] any restriction on [protected] speech." *44 Liquormart*, 517 U.S. at 507 (plurality). But what it cannot do is what New York did here: ban an entire category of speech because some of it has the potential to mislead. *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 109 (1990).

With respect to gouging: New York could have taken a narrower path here as well. All it had to do was regulate the difference charged between the credit amount and cash amount—by banning only excessive surcharges, for example, or by expressly authorizing merchants to impose "reasonable" surcharges, as New York does when it plays the role of merchant. *See, e.g.*, N.Y. Pub. Auth. Law § 1045-j(4-a)(b). Either would be a permissible regulation of conduct. *See 44 Liquormart*, 517 U.S. at 507 (plurality) (explaining that "direct regulation" is preferred to restricting speech); *id.* at 530 (O'Connor, J., concurring) (explaining that state's purported aim "could be accomplished by establishing minimum prices").

But "the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends." *Id.* at 512 (plurality). "Before a government may resort to suppressing speech to address

a policy problem, it must show that regulating conduct has not done the trick or that as a matter of common sense it could not do the trick." *BellSouth*, 542 F.3d at 508. New York can't do that. "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson*, 535 U.S. at 373.

II. The Vagueness of the No-Surcharge Law Chills Petitioners' Protected Speech.

The surcharge ban's First Amendment deficiencies are exacerbated by its vagueness—that is, its failure to "provide a person of ordinary intelligence fair notice of what is prohibited," and its risk of "arbitrary or discriminatory" enforcement. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

The law's vagueness "raise[s] special First Amendment concerns" for two reasons. *Reno*, 521 U.S. at 871-72. The first is "its obvious chilling effect on free speech." *Id.* at 872. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). New York's statute "lacks the precision that the First Amendment requires." *Reno*, 521 U.S. at 874. It turns on a "subtle semantic distinction" concerning speech used to describe otherwise legal prices, *Fulvio*, 517 N.Y.S.2d at 1014, forcing petitioners to "steer far wider of the unlawful zone than if boundaries of the forbidden areas were clearly marked," *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 807 (2011) (Alito, J., concurring) (ellipses omitted). The second reason is that the law carries criminal penalties, which "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno*, 521 U.S. at 872. "[T]his increased deterrent effect, coupled with the 'risk of discriminatory en-

forcement' of vague regulations, poses [even] greater First Amendment concerns." *Id.*

1. Rather than take special care to protect against these chilling effects, the Second Circuit did the opposite: it used the law's vagueness as an excuse to shirk its obligation to fully adjudicate the case. The court acknowledged that New York's law is "unclear"—at least outside of what it called "single-sticker-price sellers." Pet. App. 40a. But then, without briefing or argument on the question, the court abstained under *Pullman*, speculating that New York's highest court might someday interpret the law narrowly. In so doing, the Second Circuit disregarded this Court's holding that First Amendment plaintiffs "have a special interest in obtaining a prompt adjudication of their rights, despite potential ambiguities of state law." *Sorrell*, 564 U.S. at 563. One of the cases *Sorrell* relied on in support of that holding, *Houston v. Hill*, stressed this Court's "particular[] reluctan[ce] to abstain" in First Amendment cases. 482 U.S. 451, 467 & n.17 (1987) (citing cases).[8]

Abstention is inappropriate because "the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right [a plaintiff] seeks to protect." *Zwicker v. Koota*, 389 U.S. 241, 252 (1967). And it is particularly unwarranted because "ab-

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[8] Even in the days before certification displaced *Pullman*'s "protracted and expensive" procedure, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75-76 (1997), this Court almost never allowed abstention in First Amendment cases—especially in "those few cases where vagueness was at issue," *Baggett v. Bullitt*, 377 U.S. 360, 376 (1964). This Court hasn't abstained in a First Amendment case in nearly forty years, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 307 (1979), and has only ever done so in challenges to new laws with no enforcement history.

stention is at war with the purposes of the vagueness doctrine." *Dombrowski v. Pfister*, 380 U.S. 479, 492 (1965). The chilling effect on the petitioners' free-speech rights thus does not depend on "speculation" that New York's law could someday be given "an expansive and arguably problematic reading." Pet App. 36a. The statute's failure to clearly define the semantic line between lawful and criminal speech directly chills speech *now*.

2. The Second Circuit also disregarded *Sorrell* in yet another way: it failed to take account of the fact that the Attorney General has advocated two starkly different interpretations of the statute *in this very litigation*. Given the need for "prompt adjudication," the Second Circuit should have recognized that the state's "change [of] position is particularly troubling in a First Amendment case," *Sorrell*, 564 U.S. at 562-63—and doubly and triply troubling in one with a vagueness challenge to a criminal law. When the state's own lawyers can't agree on what the statute means, how can a small merchant have any confidence that she can comply?

But even if the state could keep its story straight, the statute would still be too vague. If it is "an anti-deception statute" "directed at misleading commercial speech," as the Attorney General argued in the district court, Dist. Ct. Dkt. 27, at 3, 39, then the state has conceded that "the statute doesn't give notice of that on its face." Dist. Ct. Hearing Tr. 6/14/13, at 5-6. The district court agreed, finding that this reading "strays markedly from the ordinary plain meaning of the statute's text." Pet. App. 80a. And "a person of ordinary intelligence" could be forgiven for failing to find clearer notice in the enforcement history. *Fox*, 132 S. Ct. at 2317. Although the Attorney General initially argued that "[t]he statute provides sellers of ordinary intelligence fair notice that they

may not impose a hidden fee on credit card users," Dist. Ct. Dkt. 27, at 40-41, that interpretation came as news to the merchants that his office targeted in recent years despite disclosing the surcharge ahead of time. *See* JA 107-08 ("That does not square with our experience."); JA 115 ("That is not what [the Attorney General's office] told me."); JA 119 ("That is news to me."); JA 125 ("[T]hat is not what the Attorney General's Office told us in 2009.").

But if, on the other hand, the law is not a false-advertising statute, and is interpreted consistent with its enforcement history, then the state has conceded that it is "untenable" and "illogical" because liability "turn[s] solely on the 'label' that a seller uses to describe its dual pricing scheme." Dist. Ct. Dkt. 27, at 2-3. The district court agreed, finding this "concession [to be] well taken," and holding (as *Fulvio* did) that it is "intolerable" for criminal liability and "possible imprisonment" to hinge on such an opaque semantic distinction. Pet. App. 80a (quoting *Fulvio*, 517 N.Y.S.2d at 1015).

Yet, on appeal, the Attorney General ignored his earlier concession. After previously asserting that his office had "enforced the statute in accordance with *Fulvio*," so that the law targeted only "hidden costs and charges," Dist. Ct. Dkt. 27, at 28, the Attorney General switched gears in the Second Circuit, claiming that *Fulvio* "was wrongly decided." NY CA2 Br. 62. The Attorney General argued that the statute, far from being a false-advertising law, "falls squarely within the heartland" of "direct regulations of economic conduct," and that "[t]he only thing that plaintiffs cannot say is that their prices include a credit-card surcharge." *Id.* at 2, 29, 35. That hardly clarifies matters. On this interpretation, a dual-pricing merchant (like Expressions Hair Design, or the

merchant in *Fulvio*) "is allowed to offer a *discount* for cash," but "a simple slip of the tongue calling the same price difference a surcharge," or saying that credit costs that much *more*, puts the merchant at "risk of being fined and imprisoned." *Dana's R.R.*, 807 F.3d at 1239. The only thing clear about that interpretation is its unconstitutionality under the First Amendment.

Nor can the statute be rescued from its ambiguity by importing the definitions from the lapsed federal ban, as the state suggested below. *See* NY CA2 Br. 63-64. To begin with, "the New York legislature chose not to enact those definitional provisions," and the state's enforcement actions are "fatal to [any] reliance on the federal definitions." Pet. App. 71a-72a. Under those definitions, the "regular price" is considered the credit-card price if (1) "no price is tagged or posted" or (2) if "two prices are tagged or posted." 15 U.S.C. § 1602(y). If New York used these definitions, neither the recent sweep of enforcement actions (which seem to fall under category one) nor the *Fulvio* prosecution (which seems to fall under category two) likely would have been brought. It is simply unreasonable to expect a merchant to read to page 63 of the state's appellate brief to make out the contours of a criminal speech prohibition, when the text and enforcement history say otherwise.

More importantly, the federal surcharge ban was itself hopelessly unclear. It said "nothing, and provide[d] no warning or guidance, about how prominently prices must be displayed or whether swipe fees must be disclosed in dollars and cents or as a percentage." Pet. App. 69a-70a. Even the drafter of these definitions, the Federal Reserve Board, lamented "the obvious difficulty in drawing a clear economic distinction between a permitted discount and a prohibited surcharge." *Cash Discount*

Act Hearings, at 9. Within a few years, the Board came to the unanimous conclusion that "the distinction [was], at best, uncertain," and that its definitions were "so complicated that the public [had thrown] up its hands in frustration," believing that "compliance [was] simply not worth" the "risk or effort." *Id.* By 1984, when the ban lapsed, this "confusion among merchants" about how "to characterize the difference as a cash discount instead of a surcharge" had produced "many inquiries [to] the Board" "about the distinction." 70 Fed. Res. Bull. at 311. This "uncertainty about the law" had "discouraged" dual pricing altogether. *Id.*

3. New York merchants, faced with criminal penalties and no guidance, are even more at sea. *See, e.g.*, JA 125 ("I don't charge differently for cash or credit. The law is too convoluted."). Even those equipped with a law degree, or a seat in the state legislature, have struggled to grasp the surcharge-discount distinction. *See* JA 121-22 (trade-association general counsel: "I have thought a great deal about the topic and I cannot discern any meaningful difference between a surcharge and a discount," but "I have counseled my clients that ... [i]t has everything to do with how you say it."); CA2 JA 129-30 (lawmaker who voted for indistinguishable Connecticut law: "[C]onceptually, I would like somebody to someday explain to me the difference between a surcharge and a discount."); *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1211-12 (E.D. Cal. 2015) ("The fact that retailers—even large national retailers with teams of in-house attorneys—do not use a dual-pricing system under the current law due to fear of enforcement is proof that the law is not clear.").

Imagine yourself in the merchant's shoes. Suppose you offer dual pricing and sell a product for $100 if the

customer pays in cash and $102 if the customer pays with credit. How do you comply with the law? What can you say? As the court that struck down California's law asked, can you list the price as "$100+2% surcharge"? *Id.* at 1211. "Does that scenario constitute an unlawful surcharge since the percentage is calculated at the cash register?" *Id.* What if you list the price as $100 but put up "large signs displayed throughout the establishment stating that a 2% surcharge will be applied for purchases made with credit cards?" *Id.* And what if one of your customers (or a lawyer for the state pretending to be a customer) calls and asks for your prices? What do you tell them? "How do you disclose to customers who purchase by phone?" *Cash Discount Act Hearings*, at 9. As the California court observed, "despite having access to extensive briefing from the Attorney General," "the answers to these questions are not clear." *Italian Colors*, 99 F. Supp. 3d at 1211.

Instead of answering these questions, the Attorney General dismisses them as "hypotheticals." BIO 12. But they "represent legitimate concerns that retailers must face when determining whether to impose a legal dual-pricing system." *Italian Colors*, 99 F. Supp. 3d at 1211. Take Expressions Hair Design. Its owners confront questions like these constantly, and find the distinction "hard to understand, and even harder to follow in practice." JA 62. "If a customer asks us whether we charge more for paying with a credit card," its owner wonders, "should we ignore or dodge the question? Are we required to answer falsely? Or should we say something like the following? 'State law does not allow us to tell you that you are paying more for using a credit card, but we can tell you that you are paying less for not using a credit card.'" *Id.* Would Expressions' otherwise lawful dual pricing become criminal if the store posted a sign (like

one it had before) saying that "we charge a 'credit price' that is 3% more than the 'cash price' due to the high swipe fees charged by the credit-card industry? JA 103. Expressions isn't willing to take the risk.

The chilling effect on the other petitioners is even more pronounced. Mindful that "possible imprisonment" looms over any merchant whose "*employee* is careless enough to describe the higher price in [the wrong] terms," *Fulvio*, 517 N.Y.S.2d at 1015, they avoid dual pricing entirely. *See, e.g.*, JA 48 ("Monitoring the day-to-day use of such a tortured verbal formulation would be next to impossible."); JA 53 ("This distinction is difficult to understand and we do not feel that our waitstaff would be able to observe that distinction in practice.").

It is hard to deny that "the many ambiguities concerning the scope of [the law's] coverage render it problematic for purposes of the First Amendment." *Reno*, 521 U.S. at 870. That no one can seem to put a finger on just how far the law sweeps only underscores its "obvious chilling effect on free speech." *Id.* at 872.

CONCLUSION

The judgment of the court of appeals should be reversed.

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No. 15-1391

RECORD AND BRIEFS

IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *et al.*,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT ERIC T. SCHNEIDERMAN

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

A New York statute, General Business Law § 518, provides that a seller may not engage in credit-card surcharging, the practice of collecting additional money in excess of the seller's usual or regular price when a consumer makes a purchase using a credit card. The questions presented are:

1. Whether General Business Law § 518's prohibition on collecting credit-card surcharges regulates a seller's conduct rather than speech and thus does not implicate the First Amendment.

2. If General Business Law § 518 is regarded as a regulation of speech, whether the statute is nonetheless constitutional because it directly and narrowly advances New York's substantial consumer-protection interests in preventing the unique harms posed by credit-card surcharging.

3. Whether the difference between a surcharge and a discount is sufficiently intelligible as a matter of common sense and commercial practice to satisfy due process.

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Arizona v. Maricopa Cty. Med. Soc., 457 U.S. 332 (1982) 32

Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989) 47,48

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) 16,39

Dana's R.R. Supply v. Attorney General, 807 F.3d 1235 (11th Cir. 2015) 40,52

Dandridge v. Williams, 397 U.S. 471 (1970) 55

Edenfield v. Fane, 507 U.S. 761 (1993) 45

Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) 36

Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) 44,45

Griffith v. Connecticut, 218 U.S. 563 (1910) 23,44

Hill v. Colorado, 530 U.S. 703 (2000) 57,58

In re Am. Express Anti-Steering Rules Antitrust Litig., 11-MD-2221, 2015 WL 4645240 (E.D.N.Y. Aug. 4, 2015) 14

In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig., 827 F.3d 223 (2d Cir. 2016) 14

Lopez v. Gonzales, 549 U.S. 47 (2006) 56

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 44,45

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 47

Mobile Oil Exploration & Producing Se. Inc. v. United Distrib. Cos., 498 U.S. 211 (1991) 23

Munn v. Illinois, 94 U.S. 113 (1876) 23

National Ass'n of Tobacco Outlets, Inc. v. City of Providence, 731 F.3d 71 (1st Cir. 2013) 24,35,38

National Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) 33

National Franchisee Ass'n v. Burger King Corp., 715 F. Supp. 2d 1232 (S.D. Fla. 2010) 32

Nebbia v. New York, 291 U.S. 502 (1934) 23

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Olsen v. Nebraska ex rel. W. Reference & Bond Ass'n, 313 U.S. 236 (1941) 23

People v. Fulvio, 135 Misc. 2d 93 (N.Y. Crim. Ct. 1987) 57

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Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941) 19

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) 42

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) 42

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 45

Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc., 547 U.S. 47 (2006) ..... passim

Sorell v. IMS Health Inc., 564 U.S. 552 (2011) 41,43,47

State Oil Co. v. Khan, 522 U.S. 3 (1997) 32

Texas v. Johnson, 491 U.S. 397 (1989) 37

Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002) 48

United States v. Batchelder, 442 U.S. 114 (1979) 51

United States v. Edge Broad. Co., 509 U.S. 418 (1993) 51

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West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 23

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 21,53

Laws

Federal

Cash Discount Act, Pub. L. No. 97-25, 95 Stat. 144 (1981) 9,10

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat 1376 (2010) 12

Fair Credit Billing Act, Pub. L. No. 93-495, 88 Stat. 1500 (1974) 4

Financial Institutions Regulatory & Interest Rate Control Act, Pub. L. 95-630, 92 Stat. 3641 (1978) 9

Pub. L. No. 94-222, 90 Stat. 197 (1976) 3-5

15 U.S.C.
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Colo. Rev. Stat. § 5-2-212 2

Conn. Gen. Stat. § 42-133ff 2

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Kan. Stat. § 16a-2-403 2

Mass. Gen. Laws Chapter 140D, § 28A 2

Me. Rev. Stat. Title 9-A, § 8-509 2

Miss. Code. § 75-24-25 32

N.Y. Gen. Bus. Law
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N.Y. Vehicle & Traffic Law § 1180(d) 29

Okla. Stat. Title 14A, § 2-211 2

P.R. Laws Title 10, § 11 2

Tex. Bus. & Comm. Code § 604A.002 2

Tex. Fin. Code § 339.001 2

Vt. Stat. Title 9 § 2461d 32

Miscellaneous Authorities

Congressional

Cash Discount Act and National Consumer Usury Commission: H'rg Before the S. Subcomm. on Consumer Affairs, 96th Cong. 22 (1980) 10

Cash Discount Act: Hr'g Before the H.R. Subcomm. on Consumer Affairs, 97th Cong. (1981) 9

Cash Discount Act: Hr'g Before the S. Subcomm. on Consumer Affairs, 98th Cong. (1984) 11

Cash Discount Act: Hr'g Before the S. Subcommittee on Consumer Affairs, 97th Cong. (1981) ..... passim

Credit Card Surcharge Ban: Hr'g Before the H.R. Subcomm. on Consumer Affairs, 98 Cong. (1984) 8,11

Fair Credit Billing Act Amendments: Hr'g Before the H.R. Subcomm. on Consumer Affairs, 94th Cong. (1975) ..... passim

FCBA Two-Tier Pricing: Hr'g Before the S. Subcomm. on Consumer Affairs, 94th Cong. (1975) ..... passim

98 Cong. Rec. 7521 8

127 Cong. Rec. 2921 10

127 Cong. Rec. 4219 49,53

127 Cong. Rec. 4225 7,46,47

Other Authorities

Black's Law Dictionary (9th ed. 2009) 22

Bolt, Wilke & Sujit Chakravorti, *Economics of Payment Cards*, Econ. Perspectives vol. 32(4) (2008), *at* ssrn.com/abstract=1297291 47

CHOICE, *Credit Card Surcharging in Australia* (2010), *at* tinyurl.com/CHOICE-Report-Surcharges 34,45,50,52

CQ Almanac, *Credit Card Surcharges* (40th ed. 1984) 11

Economides, Nicholas & David Henriques, *To Surcharge Or Not To Surcharge?* (ECB Working Paper Series No. 1388 Oct. 2011) 46

Kahneman, Daniel, et al., *Anomalies*, 5 J. Econ. Persp. 193 (1991), *at* https://www.princeton.edu/~kahneman/docs/Publications/Anomalies_DK_JLK_RHT_1991.pdf 34

Lee, Ian, et al., *Credit Where It's Due* (Oct. 2013), at www.macdonaldlaurier.ca/files/pdf/MLIPaymentCardRegulation10-13Draft5.pdf ..... passim

McAndrews, James & Zhu Wang, *The Economics of Two-Sided Payment Card Markets* (Fed. Reserve Bank of Richmond Working Paper 12-06 2012), *at* https://www.richmondfed.org/publications/research/working_papers/2012/wp_12-06 53

Model Penal Code § 1.13 28

Mohammed, Rafi, *The 1% Windfall* (2010) 26

Office of Fair Trading, Payment surcharges: Response to the Which? super-complaint (July 2012), *at* tinyurl.com/OFTResponse..... 50

Reserve Bank of Australia, *Review of Card Surcharging: A Consultation Document* (June 2011), *at* tinyurl.com/ReserveBankAustralia-Review..... 45,46

Rochet, Jean-Charles & Jean Tirole, *An Economic Analysis of the Determination of Interchange Fees in Payment Card Systems*, 2 Rev. Network Econ. 69 (2003), *at* tinyurl.com/Rochet-Tirole-Econ-Interchange..... 45

Rosenfeld, Allen, Point-of-Purchase Bank Card Surcharges (2010), *at* https://www.newamerica.org/asset-building/policy-papers/point-of-purchase-bank-card-surcharges/ 46,48

Rysman, Marc & Julian Wright, The Economics of Payment Cards (Nov. 2012), *at* sites.bu.edu/mrysman/files/2013/10/Economics-of-Payment-Cards1.pdf..... 45,46

Webster's Third New International Dictionary (2002)..... 22,30

Zywicki, Todd J., The Economics of Payment Card Interchange Fees and the Limits of Regulation (Geo. Mason Univ. L. & Econ. Research Paper Series No. 10-26 June 2010), *at* ssrn.com/abstract_id=1624002..... 47,53

INTRODUCTION

When you buy a sandwich at a restaurant, the restaurant will give you a bill with the sandwich's price before you decide how you will pay. If you give the restaurant a credit card to complete your purchase, a New York law, N.Y. Gen. Bus. Law (GBL) § 518, restricts what the restaurant may do next: it is forbidden from increasing its regular sandwich price based on your choice to use a credit card. This surcharge prohibition regulates conduct, not speech, because it affects what the restaurant may and may not do when presented with a credit card for payment.

Section 518 is a classic form of price regulation that implicates no First Amendment concerns. Everybody in this litigation agrees that a law may regulate a seller's prices without interfering with any protected speech. New York's surcharge prohibition is such a law: similar to a price ceiling, it forbids only the imposition and collection of additional fees from credit-card users in excess of the regular price, without in any way limiting sellers' ability to use speech to educate customers about the costs of credit-card usage.

Petitioners' contrary position relies on the untenable assertion that a "surcharge" is merely a "label" to describe a differential between the prices paid by credit-card customers and cash customers, and that this differential could just as easily be recharacterized as a "discount." But "surcharge" and "discount" are not just interchangeable labels. Rather, they are mutually exclusive terms that describe whether a seller has moved up or down from its regular price. And common experience confirms

the ease of distinguishing between these practices: if a restaurant adds two dollars to your bill after you hand them a credit card, you are unlikely to mistake this unambiguous surcharge for a discount.

Section 518 thus regulates the economic conduct of increasing prices on account of a customer's credit-card use. Like any other pricing conduct, the imposition of such a surcharge is simply not an act of speech that the First Amendment restricts the government from regulating.

STATEMENT

I. Statutory Background

New York, nine other States, and Puerto Rico have made the policy choice to prohibit sellers from engaging in credit-card surcharging, the practice of collecting an extra fee above the regular price from consumers who make purchases with credit cards.[1] Five of these States also prohibit sellers from collecting surcharges from consumers who use debit cards.[2] Because New York's surcharge prohibition is modeled on, and intended to serve the same policy purposes as, a federal statute that was in effect from 1976 to 1984, a review of that predecessor federal

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[1] Cal. Civ. Code § 1748.1; Colo. Rev. Stat. § 5-2-212; Conn. Gen. Stat. § 42-133ff; Fla. Stat. § 501.0117; Kan. Stat. § 16a-2-403; Me. Rev. Stat. tit. 9-A, § 8-509; Mass. Gen. Laws ch. 140D, § 28A; Okla. Stat. tit. 14A, § 2-211; P.R. Laws tit. 10, § 11; Tex. Fin. Code § 339.001.

[2] Conn. Gen. Stat. § 42-133ff; Kan. Stat. § 16a-2-403; Me. Rev. Stat. tit. 9-A, § 8-509; Okla. Stat. tit. 14A, § 2-211; Tex. Bus. & Comm. Code § 604A.002.

statute is useful to understanding the surcharge provision at issue here.

A. The Prior Federal Prohibition on Credit-Card Surcharging

1. To protect consumers, Congress prohibited sellers from imposing credit-card fees in excess of the regular price

In 1976, Congress enacted a credit-card surcharge ban that prohibited merchants from imposing additional charges above their regular prices when customers pay with a credit card. Pub. L. No. 94-222, § 3(c)(1), 90 Stat. 197, 197 (1976) (codified at 15 U.S.C. § 1666f(a)(2) (1982), *reprinted at* U.S. Br. App. 3a). The statute did not prohibit the separate practice of providing a discount, or reduction from the regular price, for payment by cash, check, credit card, or other means. *See id.* The statute contained a sunset clause, providing that it would expire in three years. *Id.* § 3(c)(2), 90 Stat. at 197.

The federal surcharge prohibition provided that "[n]o seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment" by another means. *Id.* § 3(c)(1), 90 Stat. at 197. The law recognized that surcharging and discounting are distinct practices that differ in their relation to a seller's baseline regular price: the statute defined the term "surcharge" as "any means of increasing the regular price to a cardholder which is not imposed" on other consumers. *Id.* § 3(a), 90 Stat. at 197 (*reprinted at* U.S. App. 2a). It also defined the term "discount" as "a reduction

made from the regular price," and specified that a discount "shall not mean a surcharge." *Id.*

This was not the first time Congress treated credit-card surcharges differently from discounts to protect consumers. In 1968, the Truth-in-Lending Act (TILA), 15 U.S.C. § 1601 et seq., had, inter alia, required merchants to make specified disclosures about finance charges, which are charges imposed as an incident to the extension of credit that are not payable in a comparable cash transaction. *See id.* § 1605. In 1974, Congress amended the statute to exempt certain discounts for payment by cash, check, or other non-credit means (hereinafter, "cash discount") from the definition of a finance charge subject to TILA's disclosure requirements. Fair Credit Billing Act, Pub. L. No. 93-495, § 306, 88 Stat. 1500, 1515 (1974) (codified at 15 U.S.C. § 1666f (1976), *reprinted at* U.S. Br. App. 3a). This exemption made no mention of credit-card surcharges. *Id.* In the same amendment, Congress further protected the provision of cash discounts by prohibiting credit-card issuers from using contractual terms to prevent sellers from offering cash discounts. *Id.* § 306, 88 Stat. at 1515. This protection also did not mention credit-card surcharges. *Id.*

Some groups later began arguing that the 1974 amendment's protections for discounts must also have applied to surcharges, on the theory that surcharges and discounts are two names for the same pricing scheme. *See FCBA Two-Tier Pricing: Hr'g Before the S. Subcomm. on Consumer Affairs* ("*FCBA Senate Hr'g*"), 94th Cong. 3 (1975) (CIS No. 76-S241-3). The Federal Reserve Board interpreted the 1974 amendments as applying only to cash discounts and not to credit-card surcharges but also sought

legislative clarification from Congress. *Id.* at 4. Ultimately, Congress declined to apply the 1974 amendment's protections to credit-card surcharges, and indeed prohibited surcharging altogether by enacting the surcharge ban that was the model for the New York law at issue here. *See* Pub. L. No. 94-222, § 3, 90 Stat. at 197.

In congressional debates on this question, legislators sponsoring or supporting the bill to prohibit surcharges emphasized that surcharging and discounting are different pricing practices distinguished by their relationship to a seller's regular price, and that in 1974, Congress had not intended to exempt credit-card surcharges from TILA's disclosure requirements or protect surcharges from contractual no-surcharge rules. *See The Fair Credit Billing Act Amendments: Hr'g Before the H.R. Subcomm. on Consumer Affairs* ("*FCBA House H'rg*"), 94th Cong. 18, 24, 95-96 (1975) (CIS No. 76-H241-1D); *id.* at 95 (Rep. Annunzio) ("never once was the question of surcharge raised because had it been raised . . . I would have jumped through the ceiling"). As Representative Wylie explained, surcharges and discounts are not identical because a surcharge "is an exaction" collected in addition to a seller's regular price while a discount "is a deduction" subtracted from a seller's regular price. *Id.* at 96; *see id.* at 1 (Rep. Annunzio) ("Let me illustrate how a surcharge works. If an item now has a regular price of $10, under a surcharge [the] credit card customer would pay $10.50, and a cash customer the regular $10 price."); *id.* at 96 (Rep. Wylie) ("[T]o say that the word 'surcharge' and the word 'discount' are synonymous[] makes us all look like fools in my judgment.").

In the course of these discussions, legislators argued that because credit-card surcharging causes economic and consumer harms that discounting does not, surcharging should be not only disclosed but also prohibited. *See FCBA House H'rg*, *supra*, at 1-2. An array of groups supported this surcharge prohibition, including the Consumer Federation of America, *id.* at 5-14; the United Steelworkers of America, *id.* at 19-22; and banking associations and credit-card companies, *id.* at 75-88, 93-94. These groups and congressional legislators explained that credit-card fees increase unfair profiteering by sellers, abusive sales tactics, and consumer confusion.

First, supporters of the surcharge prohibition opined that credit-card surcharging incentivizes sellers to extract windfall profits from consumers. As these supporters explained, sellers would not use surcharges to recoup from credit-card users only the fees that sellers pay to credit-card issuers and banks (hereinafter, "merchant fees")—as sellers claimed in lobbying Congress. *Id.* at 6-8, 17, 89-90; *see id.* at 56 (Atlantic Richfield Petroleum). Rather, as the Consumer Federation of America concluded, sellers would use credit-card surcharges to "maximize profits" by collecting fees far exceeding any cost of credit—particularly in markets that lack "competitive forces" to "safeguard against surcharge abuse" and in industries where customers cannot easily use a different payment method. *Id.* at 6-7 ("[r]enting an automobile, making reservations for tickets and other transactions are often impossible" without a credit card).

Supporters and opponents of the surcharge prohibition also recognized that most sellers would not lower their regular prices if permitted to

surcharge—a failure that would result in sellers collecting profits from credit-card users while other consumers received "no benefit" because they would continue to pay regular prices that already included any actual costs of credit. *Id.* at 1; *see FCBA Senate Hr'g*, *supra*, at 52 (Consumers Union) ("I would be foolish to claim that no merchant will ever inflate his prices."); *id.* at 6 (Federal Reserve) (sellers could "add this surcharge onto their total price schedule"); 127 Cong. Rec. 4225 (Sen. Garn) ("If the Senator believes that the general price level will go down . . . and that the surcharge will not be just an additional cost to the consumer, then I suggest that he believes in the tooth fairy."). And legislators and consumer groups further explained that any actual credit-card costs built into regular prices were difficult to discern because sellers receive significant economic advantages from accepting credit cards, including more customers, higher consumer spending, and a "safe credit plan" for which they bear no risk. *FCBA House H'rg*, *supra*, 20-21.

Second, legislators and congressional witnesses explained that credit-card surcharging increases deceptive and unfair sales practices. They warned, for example, that credit-card surcharges motivate sellers to engage in "bait and switch tactics" that lure customers with regular prices and then collect surprise credit-card fees at the register when consumers may be unwilling to forego the transaction or unable to use another payment form. *Cash Discount Act: Hr'g Before the S. Subcommittee on Consumer Affairs* ("*CDA Senate Hr'g*"), 97th Cong. 1 (1981) (CIS No. 81-S241-15); *see FCBA House H'rg*, *supra*, at 90. And they cautioned that even absent egregious misconduct, sellers can use surcharges to

pressure customers into paying more than they anticipated because most consumers expect the regular price to be "the price" for an item irrespective of "how they pay." *CDA Senate Hr'g*, *supra*, at 18.

Third, legislators, consumer groups, and the Federal Reserve expressed concern that surcharging would cause "incredible confusion" for consumers and hamper their ability to comparison shop. *Id.* at 2; *see id.* at 8. As the Federal Reserve explained, surcharges could "frustrate" consumers by requiring them to solve multiple math problems to understand the cheapest price. *FCBA Senate Hr'g*, *supra*, at 8-9.

Legislators and unions also emphasized that the economic harms from credit-card fees would be particularly burdensome for middle-income consumers, for whom credit-card use is often "a necessity." *FCBA House Hr'g*, *supra*, at 20; *see Credit Card Surcharge Ban: Hr'g Before the H.R. Subcomm. on Consumer Affairs* ("*Surcharge-Ban Hr'g*"), 98 Cong. 72 (1984) (CIS No. 84-H241-35) (New York Consumer Protection Board explaining that consumers often use credit cards for such purchases as buying eyeglasses or repairing a car). As the United Steelworkers union recognized, "[b]ecause many consumers will continue to use credit cards, regardless of the cost," credit-card surcharges would "place an unjustifiable burden" on consumers least able to afford such fees. *Id.* at 21 ("[I]t would be foolish then to assume that the majority of credit cards belong to the affluent who could afford to pay surcharge."); *see* 98 Cong. Rec. 7521 (noting that "41 percent" of adults earning "less than $10,000 a year" and "[n]early 50 percent of our senior citizens" use credit cards).

2. Congress continues its consumer-protection policies by extending the federal surcharge prohibition

Congress twice extended the federal surcharge prohibition for additional time periods. *See* Financial Institutions Regulatory & Interest Rate Control Act, Pub. L. 95-630, § 1501, 92 Stat. 3641, 3713 (1978); Cash Discount Act, Pub. L. No. 97-25, § 201, 95 Stat. 144, 144 (1981).

During debates over the extensions, supporters and opponents of the surcharge ban emphasized the commonsense difference between surcharging and discounting: a seller imposes a credit-card fee by collecting the "regular price plus a surcharge" while a seller gives a discount by providing "a reduction in the regular price." *CDA Senate Hr'g*, *supra*, at 3; *see Cash Discount Act: Hr'g Before the H.R. Subcomm. on Consumer Affairs* ("*CDA House Hr'g*"), 97th Cong. 13 (1981) (CIS No. 81-H241-13) (Rep. Wylie) ("I do not have any trouble with drawing a distinction between [surcharges and discounts]. One is marking it up and the other one is marking it down."); *CDA Senate Hr'g*, *supra*, at 97 (Consumers Union) ("surcharge system" adds fee to "normal price" while "discount system" subtracts amount from "normal price"). And legislators and congressional witnesses again opined that surcharging but not discounting causes windfall profiteering, abusive sales tactics, and customer confusion. *See CDA Senate Hr'g*, *supra*, at 1-3, 56, 59, 64, 105-06, 110.

Legislators also determined that a seller's regular price is easily ascertainable in most retail transactions, and is important to both sellers and consumers. As Senator Chafee explained, most sellers

"list a price" that is the regular price for an item and then "anybody who comes" to the store understands that they are not expected to "pay more than" the regular price "no matter how they pay." *Id.* at 18; *see id.* at 17 (sellers' "list price" is generally price at which "they are prepared to sell" an item irrespective of payment method); *id.* at 106 (describing consumer who goes "into the store" and sees "a pile of sweaters" with a price of "*x* dollars" and knows "[t]hat's the price").

To address the possibility of circumstances when a seller's regular price might not be easily discernible, Congress added a statutory definition for the term "regular price" in 1981. Cash Discount Act, § 102(a), 95 Stat. at 144; *see* 127 Cong. Rec. 2921 (Rep. Annunzio). The definition provided that a seller's "regular price" would be (1) the posted price, if a seller posts only one price; or (2) the credit-card price, if a seller either does not post any price or posts prices for both credit and cash purchases. Cash Discount Act § 102(a), 95 Stat. at 144 (reprinted at U.S. App. 2a). Congress thus defined any system of two posted prices as involving a discount rather than a surcharge. The operative prohibition remained unchanged and continued to prevent a seller from imposing a surcharge on credit-card users, with the "regular price" serving as the "clear benchmark" onto which an impermissible surcharge was added. *Cash Discount Act and National Consumer Usury Commission: H'rg Before the S. Subcomm. on Consumer Affairs*, 96th Cong. 22 (1980) (CIS No. 81-S241-9).

3. The federal surcharge prohibition lapses, but federal law continues to distinguish between surcharges and discounts

Congress again debated the surcharge prohibition when the law approached its expiration in 1984, with many legislators supporting a permanent ban on "extra charge[s] added to" the regular price for credit-card use. *The Cash Discount Act: Hr'g Before the S. Subcomm. on Consumer Affairs* ("*1984 CDA Hr'g*"), 98th Cong. 3 (1984). Business interests lobbying Congress were divided: credit-card companies supported the surcharge prohibition, while retailers and oil companies did not. *Compare id.* at 79-84 (Visa), *with id.* at 246-58 (American Petroleum Institute), *and Surcharge-Ban Hr'g*, *supra*, at 188-98 (American Retail Federation). And the policy issues surrounding credit-card surcharges also "split the consumer movement." *Surcharge-Ban Hr'g*, *supra*, at 63; *see id.* at 249 (Wisconsin Attorney General explaining that "[c]onsumer groups are divided"); *id.* at 63-70 (New York Consumer Protection Board supporting surcharge prohibition). The federal surcharge prohibition ultimately lapsed after the House and Senate failed to resolve an impasse over whether to ban surcharges permanently or to allow such fees, and a compromise to extend the law temporarily did not succeed. *See* CQ Almanac, *Credit Card Surcharges* 297-98 (40th ed. 1984).

Nonetheless, federal law continues to regulate surcharging and discounting as different practices distinguished by their relation to a seller's "regular price." TILA continues to define the terms surcharge and discount separately: a surcharge is "any means of increasing the regular price," 15 U.S.C. § 1602(r),

while a discount is a "reduction made from the regular price" and "shall not mean a surcharge," § 1602(q). And, as prior to enactment of the federal surcharge prohibition, a cash discount is not a "finance charge" subject to TILA's disclosure requirements if offered to all buyers and "disclosed clearly and conspicuously," *id.* § 1666f(b), but a credit-card surcharge is a finance charge subject to certain disclosure requirements, *see id.* (containing no surcharge exemption).

Moreover, the Durbin Amendment, enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, also uses a seller's regular price to distinguish between surcharging and discounting, and to subject those two practices to differing regulatory treatment. Pub. L. No. 111–203, § 1075, 124 Stat 1376, 2072-73. The amendment prevents credit-card networks from using their private contracts with sellers to prohibit sellers from providing certain *discounts* to consumers paying with "cash, checks, debit cards, or credit cards," but does not similarly protect *surcharges* imposed based on consumers' payment method. 15 U.S.C. § 1693o-2(b)(2)(A). And protected discounting is differentiated from unprotected surcharging: a "discount" is a "reduction made from the price that customers are informed is the regular price," but not an increase from that "regular price." *Id.* § 1693o–2(c)(4).

B. New York's Enactment of a Credit-Card Surcharge Prohibition Modeled on the Prior Federal Surcharge Ban

In 1984, after the federal surcharge law expired, New York made the policy choice to prohibit credit-card surcharges. (J.A. 84; *see* J.A. 67, 80-81). New York's surcharge prohibition adopts the operative

prohibition of the prior federal law: "no seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash..." GBL § 518 (*reprinted in* U.S. App. 1a). Although the statute does not expressly incorporate the federal definitions, the New York Legislature made clear that New York's law was intended to parallel the federal prohibition on "increasing the regular price" for an item based on credit-card use. (J.A. 86; *see* J.A. 81.) And like Congress, New York did not regulate the separate practice of discounting, i.e., reducing the regular price for consumers using a particular payment form. (*See* J.A. 80, 86.)

As both legislators and the New York Consumer Protection Board made clear, the state surcharge prohibition continues the same consumer-protection purposes of the lapsed federal ban. (J.A. 82, 84-86.) Specifically, the State Legislature prohibited credit-card surcharging because it determined that this practice incentivizes sellers to reap "windfall" profits without providing any "concomitant benefit for consumers" (J.A. 86); increases "dubious" tactics that place consumers at an "unfair disadvantage" (J.A. 82-83); and causes consumer confusion that can hurt the economy (*see* J.A. 89). These policy determinations are supported by the legislative records of the prior federal surcharge prohibition on which New York based its statute. (*See* J.A. 82-86.)

II. Private Antitrust Lawsuits

Until recently, state no-surcharge laws were "effectively redundant" because private contractual agreements between sellers and credit-card companies prohibited sellers from imposing credit-card surcharges. (Pet. App. 9a.) In 2005, sellers began filing class-action lawsuits asserting federal antitrust claims against credit-card companies based, in part, on the contractual surcharge prohibitions. (*See* Pet. App. 9a n.5.) The parties to those litigations entered into two class-action settlements in which the credit-card companies agreed, among other things, to lift the contractual surcharge restrictions under certain conditions. *See In re Am. Express Anti-Steering Rules Antitrust Litig.* ("*AmEx*"), 11-MD-2221, 2015 WL 4645240, at *3-*5 (E.D.N.Y. Aug. 4, 2015). However, these settlements have since been invalidated by the courts, in one case because of inadequate representation of the class plaintiffs, *see In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.* ("*Interchange Fee*"), 827 F.3d 223, 228-30 (2d Cir. 2016), *petition for cert. filed*, No. 16-710 (U.S. Nov. 29, 2016), and in another case because of "egregious conduct" by the class plaintiffs' co-lead counsel that rendered the settlement procedurally unfair, *AmEx*, 2015 WL 4645240, at *13-*21. As a result, the future of the contractual no-surcharge rules is uncertain.

Although these settlements failed to gain final court approval, the settlements are important because they show that both sides understood an objectively ascertainable difference between surcharges and discounts, defined in relation to an objectively ascertainable regular transaction price. *See* Settlement Agreement 20-23, *AmEx*, No. 11-MD-02221 (ECF No. 306-2, Ex. A); Settlement Agreement 49-54,

Interchange Fee, No. 05-MD-1720 (ECF No. 1656-1, Ex. 1). Specifically, the agreements placed restrictions on credit-card surcharging that did not apply to discounts. *See, e.g.*, Settlement Agreement 41-42, *Interchange* (ECF No. 1656-1, Ex. 1).

III. This Litigation

A. Petitioners' Lawsuit

In 2013, petitioners—five businesses (and their owners)—filed this lawsuit against the New York Attorney General and three county district attorneys to challenge the constitutionality of New York's surcharge prohibition under the First and Fourteenth Amendments of the United States Constitution. (J.A. 1, 24, 38-39.) Petitioners allege that they want to impose credit-card surcharges on consumers by setting "only a single price for their goods and services" and collecting "more than that price [from] credit-card customers." (Pet. App. 15a; *see, e.g.*, J.A. 101 ("Five Points Academy would like to impose an extra charge" for credit-card use).)

Petitioners allege that they do not impose such fees because they understand that Section 518 forbids credit-card surcharges. (*See, e.g.*, J.A. 26.) Although petitioners also understand that New York law allows them to provide discounts to consumers who use cash or other payment forms, four petitioners assert that they do not do so. (J.A. 43, 47, 52, 57.) Petitioners also allege that they do not want to set two separate prices—a "cash price" and a "credit-card price"—for each item or service they sell. (Pet. App. 16a; *see* J.A. 101, 104.) One petitioner, Expressions Hair Design, alleges that it currently engages in a pricing practice that results in a credit-

card user and a cash user paying different prices. However, Expressions does not explain whether it achieves that result by providing cash discounts—i.e., collecting less than its regular prices for cash payment—or by setting different cash prices and credit-card prices for each product and service. (*See* J.A. 59-62.) No petitioner alleges that it has faced any enforcement action or threat of enforcement action for its pricing practices.

B. The District Court's Decision

The United States District Court for the Southern District of New York (Rakoff, J.) held that New York's surcharge law regulated speech in violation of the First Amendment, and issued a preliminary injunction prohibiting the enforcement of the surcharge law against petitioners. (Pet. App. 85a.) The court acknowledged that the surcharge prohibition "by its terms only prohibits credit-card 'surcharges'" (Pet App. 57a), and that "[p]ricing is a routine subject of economic regulation" that does not itself implicate the First Amendment (Pet App. 74a). But the court nevertheless concluded that the surcharge prohibition "regulates speech, not conduct" (Pet. App. 73a), reasoning that surcharges and discounts are always identical and thus distinguishable only by "words and labels." (Pet. App. 68a, 73a.) The court also concluded that the surcharge prohibition did not pass the test for commercial-speech regulations developed in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), and was impermissibly vague. (Pet. App. 75a-80a.)

The parties then stipulated to a court-ordered final judgment declaring the surcharge law unconsti-

tutional and issuing a permanent injunction. The defendants reserved their right to appeal.[3] (Pet. App. 48a-54a.)

C. The Second Circuit's Decision

The U.S. Court of Appeals for the Second Circuit vacated the judgment and remanded for dismissal of the complaint. (Pet. App. 3a.) The court determined that petitioners are challenging the application of New York's surcharge prohibition to "two distinct kinds of pricing schemes," and separately analyzed the constitutionality of each such prohibition. (*See* Pet. App. 13a-18a, 31a-37a.)

First, the court considered the only pricing practice in which petitioners "would like to be engaged" (Pet. App. 18a)—setting a single "regular price" and then extracting additional money in excess of that baseline price when consumers use a credit card. (Pet. App. 3a; *see id.* 14a-15a, 11a.) The court found that New York's statute prohibited this pricing practice based on the "ordinary meaning" of the term "surcharge"—i.e., levying an "additional amount above the seller's regular price" (Pet. App. 13a-14a).

The court held that this prohibition is constitutional. As to petitioners' First Amendment claim, the court determined that the prohibition against extracting credit-card fees in excess of a seller's regular price is a direct price control that regulates "conduct, not speech" and thus does not

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[3] The final judgment also dismissed petitioners' antitrust claim, which is not at issue here, without prejudice to petitioners renewing this claim if the final judgment were to be reversed. (Pet. App. 51a.)

implicate the First Amendment at all. (Pet. App. 27a, *see id.* 18a-28a.) The court also held that this prohibition was not transformed into a speech restriction simply because it allows sellers to engage in discounting, the distinct practice of collecting an amount "*below* the regular price" for consumers using cash. (Pet. App. 14a.)

The court rejected petitioners' theory that surcharging and discounting are synonymous practices and that the surcharge prohibition thus restricted only the "words and labels" used to describe the price differentials between the final prices paid by credit users and cash users. (Pet. App. 20a.) Rather, the court explained: "What Section 518 regulates—all that it regulates—is the difference between a seller's [regular] sticker price and the ultimate price that it charges to credit-card customers." (Pet. App. 21a-22a.) A seller remains free to characterize the price differential between credit-card users and cash users "as whatever it wants"—i.e., as a surcharge or a discount—but such descriptions "would not change the fact" that adding credit-card fees to a regular price is prohibited while deducting amounts from a regular price is permitted. (Pet. App. 22a.)

The court also rejected petitioners' vagueness challenge with respect to such run-of-the-mill surcharging schemes, concluding that both "sellers 'of ordinary intelligence'" and enforcement authorities would "readily understand" that adding credit-card fees above a seller's regular price violates the statute. (Pet. App. 42a.)

Second, the court considered whether New York's surcharge prohibition would also prohibit hypothet-

ical pricing methods that lack an easily discernible regular price—such as scheme in which a seller actually sets separate "credit prices" and "cash prices." (Pet. App. 15a.) Noting that the New York appellate courts had never interpreted the scope of New York's statute (Pet. App. 32a), the court abstained from ruling on the statute's constitutionality with respect to such practices under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). (Pet. App. 28a, 45a.) The court explained that *Pullman* abstention was appropriate because the statute is "readily susceptible to a construction under which" it does not apply to abstract pricing schemes that lack regular prices (Pet. App. 18a (quotation marks omitted)) and "it is entirely possible, if not likely, that New York courts" would adopt that statutory interpretation (Pet. App. 35a).

SUMMARY OF ARGUMENT

I. Petitioners challenge a New York statute that prohibits sellers from imposing extra fees on consumers who use a credit card. This prohibition on credit-card surcharging is a direct price regulation that targets conduct and thus does not implicate the First Amendment at all.

Price controls have long been considered direct economic regulations that do not target speech because they regulate what sellers can do when collecting money from customers. Like many such pricing regulations, and like a federal law that was in place from 1976 to 1984, New York's surcharge prohibition regulates conduct by restricting the amount of money a seller can collect in relation to a

baseline price—specifically, a seller cannot impose a surcharge by collecting more than its regular price from credit-card users.

Petitioners' attempts to recharacterize this regulation of pricing conduct as a speech restriction are meritless. Their argument that surcharges and discounts are merely two ways of describing the same conduct ignores the baseline regular price on which the surcharge prohibition turns. Against that baseline, surcharges and discounts are not interchangeable "labels," but rather mutually exclusive adjustments up or down from the regular price.

Similarly, petitioners are wrong to assert that Section 518 has no meaningful effect on pricing conduct—and thus must be a speech regulation—because sellers can impose whatever price they want on credit-card users so long as they structure their pricing scheme in a way that sets the regular price at or above the credit-card price. Such a constraint on sellers' pricing practices *is* a regulation of economic conduct. And contrary to petitioners' unsupported assumption, Section 518 does meaningfully limit credit-card prices by requiring that they be no higher than sellers would be willing or able to set their regular prices.

Section 518 imposes no other restraints on sellers. Sellers thus remain free to communicate their views about credit-card costs, and to characterize their prices—or price differentials between different categories of users—in any way they see fit.

II. New York's surcharge prohibition would satisfy the First Amendment even if it affected speech. At most, the law regulates the bare commercial speech of conveying prices, and would thus be subject to more deferential First Amendment scrutiny under the *Central Hudson* framework for commercial speech or the standards set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) for disclosure rules. No higher scrutiny would be warranted because the surcharge prohibition does not turn on any topic, idea, or expressive message.

The surcharge prohibition would pass muster under *Central Hudson* because it implements a narrow regulation that directly advances the State's substantial interests in protecting consumers from unfair profiteering, preventing deceptive and abusive sales tactics, and reducing consumer confusion that harms the economy. New York's law would also satisfy the *Zauderer* framework because it parallels the prior federal surcharge prohibition in ensuring that consumers are informed of the highest price that a seller would charge on account of credit-card use.

III. The surcharge prohibition is not unconstitutionally vague. In the vast majority of retail transactions, there can be no plausible confusion over whether a seller is imposing a surcharge above the regular price or a discount below the regular price. And where a seller truly has both a "credit-card price" and a "cash price," the surcharge prohibition would not apply because the seller has forgone the usual commercial practice of setting a regular price. While other, borderline cases can be imagined, such hypothetical possibilities are

insufficient to invalidate New York's law on vagueness grounds.

ARGUMENT

I. New York's Surcharge Prohibition Is a Direct Economic Regulation Not Subject to First Amendment Scrutiny.

New York's prohibition on credit-card surcharging is a direct price regulation that controls how sellers set prices and collect money from their consumers, not what they may or may not say about their prices. The statute provides that a seller may not "impose a surcharge" on credit-card users. GBL § 518. By its plain terms, this law prohibits sellers from collecting additional money, in excess of the usual or regular price, from consumers who pay with a credit card. (Pet App. 13a-14a (citing *Webster's Third New International Dictionary* 2299 (2002) (defining "surcharge" as "a charge in excess of the usual or normal amount"); *Black's Law Dictionary* 1579 (9th ed. 2009) (defining "surcharge" as "[a]n additional tax, charge, or cost").) Put another way, the law effectively requires sellers that have chosen to take credit cards to accept the use of a card when a customer is willing to pay the usual or regular price. The First Amendment does not apply to such direct regulation of economic conduct.

A. The Surcharge Prohibition Regulates Sellers' Conduct, Not Their Speech, by Preventing Them from Collecting Money from Credit-Card Customers above the Regular Price.

1. As petitioners concede (Pet. Br. 34-36; *see* U.S. Br. 14, 16), price regulations do not implicate the First Amendment at all because they regulate economic conduct rather than speech: they prevent sellers from collecting money above (or below) a benchmark price, or mandate that the seller provide a good or service to all customers willing to meet a certain price. Regulations fixing prices have existed "from time immemorial, and in this country from its first colonization." *Munn v. Illinois*, 94 U.S. 113, 125 (1876). And this Court has routinely upheld such laws so long as they have a rational basis, without subjecting them to First Amendment scrutiny. *See, e.g.*, *Mobile Oil Exploration & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 221-26 (1991) (natural gas); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398-99 (1937) (minimum-wage laws); *Nebbia v. New York*, 291 U.S. 502, 519-20, 539 (1934) (milk); *Griffith v. Connecticut*, 218 U.S. 563, 564 (1910) (usury laws); *see also Olsen v. Nebraska ex rel. W. Reference & Bond Ass'n*, 313 U.S. 236, 244-45 (1941) (collecting cases).

This Court has already held that a law may prohibit a seller from charging more or less than a specified price without implicating the First Amendment. In *44 Liquormart, Inc. v. Rhode Island*, eight justices agreed that, while the First Amendment prohibited Rhode Island from banning advertisements about lawful liquor prices, the State could have instead directly required sellers to

maintain "higher prices" for alcohol; such a regulation "would not involve any speech restrictions" at all. 517 U.S. 484, 507 (1996); *see id.* at 530 (O'Connor, J., concurring in the judgment) ("establishing minimum prices" would not restrict speech); *id.* at 524 (Thomas, J., concurring in part and concurring in the judgment) ("controlling [the] price" of an item involves "no restriction on speech").

2. The rule should be no different if the baseline to evaluate pricing conduct is not a specific numeric price dictated by law, but rather the seller's regular price—i.e., the price given to customers, by tag or sign or other means, before they indicate whether and how they intend to pay. Put simply, Section 518 provides that a seller may not collect more than the regular price from a customer on account of his use of a credit card. The regular price thus serves in effect as a price ceiling for credit-card users.

Numerous other laws regulate prices in this manner—i.e., by using a seller's regular price as a benchmark, and dictating how a seller may adjust that price. For example, laws mandate or prohibit various discounts from a seller's regular prices: requiring telecommunications providers to give discounts below their regular rates to schools and libraries, 47 U.S.C. § 254(h)(1)(B); or prohibiting tobacco sellers from giving discounts below the regular price for a pack of cigarettes, *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 74, 77-78 (1st Cir. 2013) (rejecting First Amendment challenge). *See also* Fla. Stat. § 627.0652(1) (insurance providers must give discounts below regular premium to certain drivers). Likewise, many laws prohibit or limit extra fees or surcharges over a seller's regular prices: capping fees

to add an additional driver to a rental car, GBL § 396-z(10)(d); or prohibiting credit-card issuers from imposing a surcharge to a consumer's credit balance for the privilege of paying the bill via electronic or other means, 15 U.S.C. § 1637(*l*). None of these laws dictates the regular or usual prices that sellers may charge. Rather, like New York's ban on credit-card surcharges, they use the regular price as a benchmark for determining whether a seller's departure from that regular price is lawful.

Indeed, petitioners apparently concede (Pet. Br. 43) that a cap on credit-card surcharges (say, at 5% above the regular price) would be "a permissible regulation of conduct" not subject to First Amendment scrutiny. But there is no constitutionally significant difference between such a cap and New York's law—both statutes set a benchmark based on a seller's regular price, and forbid sellers from collecting money from credit-card users above that benchmark. If a State may prohibit credit-card surcharges that exceed a certain percentage above the regular price, then the First Amendment provides no reason that the State may not set that percentage at zero and prohibit all such surcharges.

3. The New York Legislature, like Congress before it, reasonably looked to sellers' regular prices as a benchmark to define the credit-card surcharges it wished to prohibit. As those legislative bodies recognized, regular prices are a familiar feature of everyday life: sellers routinely set "single, readily ascertainable prices for their goods or services" (Pet. App. 15a); and in practice they convey those regular prices to customers—whether on stickers, tags, menus, or the digital displays of cash registers—before customers decide how, or even whether, they

will pay. *See CDA Senate Hr'g*, *supra*, at 106 (Senator Chafee) (explaining that consumers "go into the store and look around, and there is a pile of sweaters and the price is *x* dollars. That's the price."). Surcharges and discounts are ordinarily understood to be adjustments to those regular prices—for example, a store will apply a coupon to the sticker price for a book. *See id.* at 3 (statement of Congressman Annunzio). *See generally* Rafi Mohammed, *The 1% Windfall* 88-109 (2010) (describing multiple ways of adjusting regular prices). Section 518 regulates this familiar commercial process by providing that a seller may not apply an upward adjustment relative to a previously conveyed regular price when, at the end of the transaction, the customer decides to use a credit card to complete the purchase.

Petitioners have never disputed—and could not dispute—that sellers routinely engage in the conduct of setting regular prices by which their subsequent pricing conduct (including credit-card surcharges) can be evaluated. Their own allegations confirm this pricing practice. For example, petitioner Five Points Academy wishes to have "a single set of prices" and then collect an additional "credit card surcharge amount" above those regular prices (J.A. 102). And petitioner Brooklyn Farmacy similarly wishes to set a single price on its menu for each food item and to collect an additional credit-card surcharge in excess of those regular prices. (J.A. 51-52.) Likewise, when investigators from the New York Attorney General's office contacted oil and gas companies for their pricing, those companies were willing to quote an initial regular "price of fuel (for example, $3.45/gallon)," and only later added "a surcharge *on top of that price*" (for example, of five cents per

gallon) when the investigators sought to pay with a credit card.[4] (J.A. 106 (emphasis added); *see also* J.A. 115, 124.)

New York's surcharge prohibition thus relies on a familiar and well-understood baseline to determine the validity of sellers' further pricing adjustments. Such regulation of economic conduct does not implicate the First Amendment.

B. Petitioners Incorrectly Characterize New York's Law as a Speech Regulation.

1. Petitioners ignore Section 518's use of the regular price as a baseline.

a. Petitioners' contention that New York's surcharge ban is a speech restriction rests on the mistaken premise that the difference between surcharging and discounting is not an objectively ascertainable difference in conduct, but only a difference in the words used to describe identical conduct. But petitioners are simply wrong to assert that "[a] 'surcharge' and a 'discount' are just two ways of framing the same price information." (Pet. Br. 1; *see id.* at 6-7, 28-30, 37, 49-50.) "Surcharge" and "discount" are not interchangeable ways of describing a deviation from a seller's regular price. To the contrary, they are mutually exclusive terms that identify whether a final price is above or below the regular price—just as going up and going down

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[4] Contrary to petitioners' mischaracterization (Pet. Br. 18), it was the companies' imposition of an additional fee on top of the usual or regular price that triggered enforcement of Section 518—not their failure to follow a "script" to describe their pricing.

from a particular floor in an elevator are distinct and mutually exclusive actions.

The relevant conduct here is thus not, as petitioners contend, "dual pricing"—i.e., charging "a higher price for those who pay by credit card [and] a lower one for those who pay in cash." (Pet. Br. 1.) Rather, the relevant conduct is the price charged to credit-card users relative to the seller's regular price, i.e., the price conveyed to buyers before a payment method has been identified.[5] So long as the seller conforms to the requirement that the credit-card price be no higher than the regular price, the seller's treatment of other payment methods is immaterial.

b. Because Section 518 regulates the relationship between the credit-card price and the regular price, a seller does not, as petitioner suggests, engage in "the same conduct" whenever it charges a particular price to credit-card users, regardless of the seller's regular price. (Pet. Br. 2; *see also* U.S. Br. 19.) Conduct may meaningfully be defined in relation to a baseline or benchmark, or with respect to other attendant circumstances. *Cf.* Model Penal Code § 1.13 (recognizing that "attendant circumstances" may be "included in the description of the forbidden conduct"). And prohibiting conduct in some circumstances but not others is still prohibiting conduct, not speech.

For example, "speeding" under the traffic laws is typically defined as driving "in excess of . . .

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[5] The regular price may *coincide* with the price that either cash or credit-card users pay, but a seller could also set a regular price that applies to many other methods of payment (debit cards, store cards, gift cards, personal checks, and so on), while deviating from that price for both cash and credit cards.

maximum speed limits," N.Y. Vehicle & Traffic Law § 1180(d). A person who drives at 40 mph when the speed limit is 25 mph thus engages in "speeding," while a person who drives at the same speed when the limit is 70 mph does not. As a physical matter the two drivers' behavior is the same, but under the traffic laws they have engaged in meaningfully and legally distinct conduct.

The law may also establish a benchmark drawn from a regulated entity's own actions. For example, a statute mandating that law schools provide "equal access" to military recruiters does not require any particular treatment of military recruiters; rather, it requires a law school to "appl[y] to military recruiters the same policy it applies to all other recruiters." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 56 (2006) ("*FAIR*"). A law school engages in impermissibly discriminatory conduct under such a statute if the access it affords to military recruiters is narrower than the access it provides to others—even though another school could permissibly treat military recruiters the same way if it had a more limited access policy for other groups in the first instance.

So too here. The relevant conduct under New York's surcharge prohibition is not simply the final price charged to credit-card customers, but rather the relationship between that price and the regular price. Contrary to petitioners' arguments, the fact that a $102 charge to a credit-card customer is lawful if the regular price is $102, but unlawful if it is $100, does not mean that New York's law has drawn a distinction based on speech. Rather, as with laws about speeding or equal access, New York's law has permissibly prohibited conduct based on the

relationship between that conduct and an objectively ascertainable baseline.

c. Section 518's reliance on a seller's regular price as a baseline for evaluating liability means that the statute has no application when a regular price cannot be readily ascertained. One such situation is when a seller posts one "dollars-and-cents price" for credit cards, and another "dollars-and-cents price" for cash. (U.S. Br. 19.)

The court below, relying on *Pullman* abstention, declined to address the applicability of Section 518 to such a situation on the ground that it was not presented by the complaint and not settled by New York appellate authority (Pet. App. 28a, 32a), and this Court could do the same. But in fact Section 518's non-application under such circumstances is fairly inferred from both its plain text and its history. Implicit in the concept of a "surcharge" is a "usual or normal" price onto which the surcharge is added. *Webster's Third New International Dictionary* 2299 (2002). In the absence of such a "usual or normal" price, there is no meaningful basis to determine whether a seller has imposed a "surcharge" from such a price, and thus no occasion to apply Section 518.[6] And this interpretation is supported by the fact that the prior federal surcharge prohibition, which New York's law was intended to parallel, also would not apply in such a situation. (Pet. App. 31a-32a; U.S. Br. 3-4, 7-8.)

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[6] The one reported criminal prosecution under Section 518, *People v. Fulvio*, is best understood as falling within this category of cases. See *infra* Point III.

Because Section 518 does not apply when a regular price cannot be identified, it imposes no restraints on sellers' prices or descriptions of their prices under such circumstances. Pricing schemes that do not involve regular prices thus do not affect the statute's constitutionality.

2. Section 518 meaningfully affects sellers' conduct even though it does not dictate final prices.

New York's surcharge prohibition does not restrict the final prices that sellers may charge. Petitioners cite that fact to argue that Section 518 "does not in any way regulate what merchants may *do*" because a seller that wishes to charge credit-card users a certain price (or a certain price differential above cash users) can do so under New York's law simply by raising their regular prices. (Pet. Br. 28.)

As a threshold matter, this argument wrongly assumes that a seller's increase of its regular price to match its credit-card price is meaningless if the credit-card price remains the same. In fact, that increase is a meaningful change in a seller's pricing conduct that advances the goals of the surcharge prohibition: for example, aligning the regular price to the credit-card price prevents credit-card customers from being surprised by a later-imposed surcharge. See *supra* at 7-8.

In any event, petitioners offer no support for their supposition that tying credit-card prices to regular prices imposes no meaningful constraint on the prices that sellers will charge to credit-card customers. The New York Legislature, like Congress before it, could reasonably have believed otherwise.

Sellers may be less willing to raise their overall regular prices than to impose a surcharge on particular subgroups of customers, since regular prices typically apply more broadly and are more widely distributed, and thus have greater effects when changed. And sellers may face constraints in setting their regular prices that they would not face with surcharges. Regular prices may be dictated by suppliers, *State Oil Co. v. Khan*, 522 U.S. 3 (1997), or by franchisors, *Nat'l Franchisee Ass'n v. Burger King Corp.*, 715 F. Supp. 2d 1232 (S.D. Fla. 2010). And regular prices are subject to market forces and consumer expectations. *Cf. Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 348 (1982) (recognizing "price competition as a market force"). For example, if consumers have come to expect that a hot dog will cost only $1, then a seller may be forced to set his posted regular price at $1 or else risk losing business to its competitors. Because regular prices thus face constraints that more narrowly applicable surcharges may not, tying credit-card prices to regular prices will inhibit certain price increases altogether.

Many other statutes similarly rely on presumed constraints on regular prices to limit a seller's further pricing conduct. For example, price-gouging laws prohibit sellers from imposing excessive surcharges above their regular prices during unusual market disruptions. *See, e.g.*, GBL § 396-r; Vt. Stat. tit. 9 § 2461d; Miss. Code. § 75-24-25. Although sellers could in theory set their regular prices at extortionate rates from the outset, price-gouging laws presume that market forces will prevent sellers from doing so, and mandate that sellers adhere to those prices even when market conditions would allow for sharp price increases. New York's credit-card surcharge prohibi-

tion restricts seller conduct in a similar manner (Pet. App. 27a n.10): it assumes that in the mine run of cases sellers will be unable or unwilling to increase their regular prices to the same degree that they would be willing to impose a surcharge on credit-card users.

Petitioners' abstract hypotheticals (*e.g.*, Pet. Br. 2) simply ignore the practical constraints on a seller's ability to set its regular prices and assume that the regular price may be set at any arbitrary level that allows a seller to charge a particular price to credit-card users. Similarly abstract reasoning would suggest that price-gouging laws are meaningless because sellers could in theory charge supra-competitive prices all the time to preserve their ability to levy such prices during market disruptions. But in deciding whether and how to address credit-card surcharges or price-gouging, New York's Legislature (like Congress before it) was entitled to rely on its understanding of how sellers set regular prices in the real world, rather than in the abstract. *Cf. Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2589 (2012) (observing that the framers of the Constitution "were practical statesmen, not meta-physical philosophers" (quotation marks omitted)). And given the practical limitations on sellers' ability or willingness to inflate their regular prices, a regulation of credit-card prices that sets the regular price as a cap meaningfully constrains sellers' pricing conduct.

3. Consumers' adverse reactions to credit-card surcharges do not imply that those surcharges are speech.

Petitioners contend that surcharges and discounts must be mere "labels" because consumers react negatively to surcharges but not to discounts. (Pet. Br. 1, 15-16, 30-32.) But this argument "plainly begs the question," as the court of appeals correctly observed (Pet. App. 22a). Customers react to seller's conduct just as much as they react to seller's speech; the fact that consumers react negatively to surcharges thus does not answer "the threshold question" of whether the surcharge prohibition regulates conduct or speech. (Pet. App. 23a.)

Indeed, the relevant evidence suggests that customers react badly to surcharges not because of some "message" they convey, but rather because they understand surcharges as the seller's collection of extra fees above its regular price—conduct that is upsetting because the seller has in effect reached into their pockets and taken additional money. *See FCBA House Hr'g, supra,* at 7; CHOICE, *Credit Card Surcharging in Australia* 4 (2010) (68% of surveyed consumers "believe that retailers and other businesses should not be allowed to charge customers extra" for credit-card use). The behavioral-economics literature relied on by petitioners does not say otherwise. Although this literature confirms the commonsense notion that consumers are emotionally affected by deviations from a seller's regular prices, it does not prove *why* they are so affected. *See, e.g.*, Daniel Kahneman et al., *Anomalies*, 5 J. Econ. Persp. 193, 203-04 (1991).

The New York Legislature's awareness that surcharging and discounting can have different effects on seller and consumer behavior also does not prove that the surcharge prohibition regulates speech. (*See* Pet. Br. 31-32.) Many direct price controls are designed to influence consumer behavior by triggering negative sentiment about higher prices, thereby reducing consumer purchasing. *See 44 Liquormart*, 517 U.S. at 507 (plurality op.); *see Tobacco Outlets*, 731 F.3d at 74 (prohibition on discounts sought to "reduce youth tobacco use"). That the purpose of these economic regulations is to influence behavior does not alter the fact that they seek to achieve their goal by regulating conduct rather than speech.

4. Section 518's reliance on a seller's regular price to determine liability does not regulate speech.

Section 518's requirement that a seller's credit-card price be no higher than its regular price depends on and may affect the regular "sticker price" that a seller conveys to customers. (*See* U.S. Br. 19.) But that effect on seller's communications does not implicate the First Amendment. As petitioners have conceded (Pet. App. 25a-26a), prices are not themselves speech. That is why direct regulation of prices is deemed to be a regulation of conduct not subject to First Amendment scrutiny (U.S. Br. 14, 16).

More fundamentally, even if the communication of prices were in some sense protected expression, New York's surcharge ban could permissibly rely on the regular price to determine liability. "[I]t has never been deemed an abridgement of freedom of

speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). For example, state law may require individuals to adhere to their contractual promises, even when those promises were previously communicated through speech (U.S. Br. 18). *See also FAIR*, 547 U.S. at 61 (holding that conduct may be evaluated with reference to "elements of speech").

New York's surcharge ban relies on the regular price in a similar manner. New York's law does not "dictate the content" of the regular price or directly control it. *See id.* at 62. To the contrary, a seller remains free to set whatever regular price it wants. All that New York's law does is use that regular price as a baseline to evaluate further price adjustments. Any effect that the surcharge prohibition might have on the seller's conveyance of a regular price is thus "plainly incidental" to the statute's "regulation of conduct." *Id.*

C. The Surcharge Prohibition Does Not Target Any Protected Speech.

1. The surcharge prohibition does not prevent any expression about credit-card costs.

New York's surcharge prohibition does not, as petitioners assert, prevent sellers from "using their most effective means of informing consumers of the cost" of credit cards. (Pet. Br. 7; *see also id.* at 27.) Petitioners "remain free under the statute to express whatever views they may have" about merchant fees, just as law schools are free to criticize or protest

against military recruiters so long as they give them equal access to on-campus recruiting. *FAIR*, 547 U.S. at 60. And petitioners acknowledge that they have in fact engaged in such advocacy, without any threat of enforcement under Section 518. (*E.g.*, J.A. 50, 57; Pet. Br. 19-20.)

Petitioners nonetheless maintain that the law targets protected expression because the very act of "imposing a surcharge" (J.A. 47) inherently communicates to consumers "how much they pay for credit" (Pet. Br. 7). But this conduct is not "inherently expressive." *FAIR*, 547 U.S. at 66. "Unlike flag burning," charging consumers an extra fee for credit-card use does not communicate any inherent message to customers aside from the fact that the seller is collecting more money above his regular price. *See id.*; *cf. Texas v. Johnson*, 491 U.S. 397 (1989). A consumer "has no way of knowing," *FAIR*, 547 U.S. at 66, that the seller has exacted the additional fee to express disapproval about merchant fees rather than for some other reason, such as seeking to obtain further profits from consumers. Indeed, nothing about a credit-card surcharge tells consumers that merchant fees even exist, let alone that the sellers have any particular view about such fees. *See id.* And any such message is further diluted by the fact that petitioners' proposed credit-card surcharges *do not match* the merchant fees they are actually charged, which vary widely for each credit-card transaction. (*See, e.g.*, J.A. 60; U.S. Br. 2.) Surcharges cannot convey "the true costs of credit" (Pet. Br. 28) if they do not actually match those purported costs.

Ultimately, consumers cannot plausibly receive any coherent message about merchant fees from the mere imposition of a credit-card surcharge alone.

Rather, the only way for customers to receive petitioners' desired message is for petitioners to tell customers about the underlying merchant fees and about plaintiffs' view that these fees are unfair. But at that point it would be the "explanatory speech" rather than the surcharge that is expressive. *See FAIR*, 547 U.S. at 66. Because Section 518 does not regulate any such collateral advocacy, the law regulates conduct rather than speech. *See id.*; *see also Tobacco Outlets*, 731 F.3d at 78.

2. The surcharge prohibition does not restrict any descriptions about lawful prices.

Petitioners also contend that the surcharge prohibition restricts speech because it turns on the words that sellers use to describe their prices, rather than on the prices themselves. (Pet. Br. 1.) But as the court of appeals correctly recognized, New York's law affects only "the actual imposition of a credit-card surcharge," not "the words that speakers of English have chosen to describe that pricing scheme." (Pet. App. 21a.) So long as a seller collects no more than the regular price from credit-card customers, it is free to describe its prices—including the price differentials between different types of users—however it wishes. (Pet. App. 22a.)

Thus, a seller is free to "tell [its] customers" that a credit-card user ultimately pays "more" than a cash user. (*See* Pet. Br. 1; *see id.* at 50.) It can post a sign saying that its regular prices include a 3% component attributable to the costs of credit cards. (*See* J.A. 60-61; Pet. Br. 50.) Indeed, as the court below observed, a seller could even characterize the credit-card price as containing a "surcharge" over the cash price, so

long as the credit-card price was at or below the regular price quoted to prospective buyers before a payment method was identified. (Pet. App. 22a.) These descriptions are all perfectly legal and "would not change the fact" that the seller is in compliance with Section 518. (*Id.*)

II. Even if the Surcharge Ban Were Viewed as a Regulation of Speech, It Would Be Permissible Under the First Amendment.

A. The Surcharge Prohibition Is Subject at Most to the *Central Hudson* Test as a Regulation of Commercial Speech.

1. Even if the surcharge prohibition had more than an incidental effect on protected expression (which it does not), it would satisfy First Amendment scrutiny. As discussed above, a seller violates New York's law when it charges a credit-card price in excess of its regular price; that seller can come into compliance with the law either by raising the regular price or by reducing the credit-card price. So long as this pricing requirement is satisfied, New York's law imposes no restrictions on how sellers characterize their prices or how they describe the differential between credit-card prices and prices for other specific methods of payment. (See *supra* Point I.C.1; U.S. Br. 26, 30.) The only expression even arguably affected by the surcharge prohibition is thus a seller's communication of its regular or credit-card prices.

Such expression of price information is at most a form of commercial speech subject to the *Central Hudson* framework. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976); *Central Hudson*, 447 U.S. at 563-66. This

Court has already held that *Central Hudson* applies to regulations targeting advertisements *about* otherwise lawful prices. *See 44 Liquormart*, 517 U.S. at 504-08 (plurality op.); *id.* at 528-31 (O'Connor, J. concurring in the judgment). The same framework should accordingly apply to regulations targeting the initial communication of prices, to the extent that such communication is speech at all. *See Dana's R.R. Supply v. Attorney General*, 807 F.3d 1235, 1249 (11th Cir. 2015) (holding that credit-card surcharge ban is subject to *Central Hudson* test).

2. Petitioners and several of their amici agree that *Central Hudson* would be the proper framework for evaluating Section 518 as a speech regulation. (Pet. Br. 35-36; *see* U.S. PIRG Br. 14; Retail Litigation Center Br. 28; First Amendment Scholars Br. 16.) But petitioners' *Central Hudson* analysis is distorted by their incorrect view of the speech at issue. Petitioners assert that the speech constrained here is the "label" of "surcharge" or "discount" that a seller uses to "truthfully" describe an otherwise lawful price differential between cash and credit-card prices. (Pet. Br. 30-31, 35, 37.) But this characterization simply misconstrues New York's statute. As explained (*supra* Point I.C.2), Section 518 leaves sellers free to characterize price differentials between different methods of payment however they want. The only restriction imposed is that sellers must structure their prices in a particular way: specifically, the regular price conveyed to consumers cannot be lower than the price conveyed to credit-card users. (*See* Pet. App. 25a-26a.)

The *Central Hudson* inquiry thus does not turn on whether New York can justify a preference for a particular description (or "label") *about* an under-

lying pricing structure. Rather, the appropriate inquiry is whether New York can justify its preference for a particular pricing structure in the first instance (i.e., setting credit-card prices at or below the regular price).

3. Contrary to the arguments of some of petitioners' amici (*see, e.g.*, Merchant Br. 5-7, 9-16), Section 518 is not subject to any more heightened scrutiny. The statute is not viewpoint-based because it broadly applies to all retail sales without regard to the seller's identity, its views on merchant fees, or the reason that the seller has decided to impose a credit-card surcharge. *Cf. Sorell v. IMS Health Inc.*, 564 U.S. 552, 569-71 (2011) (concluding that regulation was speaker-based where it allowed only certain speakers to obtain prescriber information).

Although petitioners do not argue that strict scrutiny should apply here (Pet. Br. 36), they nonetheless suggest that Section 518 is viewpoint-based because it restrains a certain "message" that sellers wish to convey—i.e., "informing consumers *why* credit is expensive" (*id.* at 30, 33). But as discussed (*supra* Point I.C.1), the mere imposition of a credit-card surcharge does not convey the seller's purported message because a customer will not know the reason for the surcharge unless it is explained; it is the explanation, and not the surcharge, that delivers the message. Moreover, even if a surcharge could by itself convey a message, Section 518's application does not turn on that message. Sellers could impose a credit-card surcharge for many reasons other than merchant fees—for example, to account for the risk of credit-card users disputing their charges, or to extract additional profits from credit-card users. Section 518 is thus not viewpoint-

based because its application turns only on the fact of a surcharge, not "the specific motivating ideology or the opinion or perspective of the speaker," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

The surcharge prohibition is also not content-based. "Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Here, New York's law applies to sellers' communication of regular or credit-card prices solely because of the relationship between these two prices, and not because of any topic, idea, or message expressed by either price.

To be sure, determining whether the credit-card price is higher than the regular price requires an examination of the numbers that a seller conveys. But a mere numerical price has never been deemed to be the type of "content" whose regulation triggers strict or heightened First Amendment scrutiny. The parties here agree that most price regulations are not subject to First Amendment scrutiny *at all* even though liability under such regulations turns on the numerical prices conveyed by sellers or the "relationships between prices." (Pet. App. 20a; *see* Pet. Br. 34-36; U.S. Br. 14, 16; *supra* Point I.A.) And this Court's development of the commercial-speech doctrine has from the outset recognized that regulation of such speech is "surely permissible" in many circumstances even though numerical prices are often part of commercial messages. *See Va. State Bd.*, 425 U.S. at 770. Applying *Central Hudson* to regulations affecting only the conveyance of numerical prices thus properly reflects the commonsense

understanding that communication about prices, to the extent it is protected by the First Amendment at all, is the quintessential form of "speech proposing a commercial transaction" that is subject to a more deferential standard of review than "other varieties of speech," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

Even if New York's surcharge ban were deemed to turn on the "content" of sellers' communications of their numerical prices, strict scrutiny would not apply. "[C]ontent-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech." *Sorrell*, 564 U.S. at 579. In particular, a content-based regulation of commercial speech will satisfy First Amendment scrutiny if it is supported by a "neutral justification," such as advancing "the government's legitimate interest in" preventing "consumer harms." *Id.* Here, as explained further below, the Legislature regulated credit-card surcharges because it determined that the risk of unfair profiteering, abusive sales practices, and consumer confusion that harms the economy "is in its view greater" from credit-card fees. *See id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388-89 (1992)). This neutral justification thus subjects New York's surcharge prohibition to scrutiny under *Central Hudson*, even assuming that the prohibition relies on the content of sellers' price communications.[7]

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[7] Petitioners assert that purported "exemptions" to Section 518 undermine the statute's consumer-protection purposes. (Pet. Br. 40-41.) But the only exemptions here apply to mandatory payments to government entities, such as bail or

(*continues on next page*)

B. The Surcharge Prohibition Directly Advances Substantial State Interests in a Reasonably Tailored Manner.

Under *Central Hudson*, a regulation of commercial speech is valid if it directly advances a substantial state interest that could not "be served as well" by a more limited speech regulation. 447 U.S. at 564; *see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553-54 (2001). New York's surcharge prohibition satisfies this standard.

1. New York's interest in reducing profiteering.

New York has a substantial interest in preventing sellers from levying excessive or unfair fees on customers. *See, e.g., Griffith*, 218 U.S. at 569. The surcharge prohibition directly advances this interest by eliminating a specific pricing practice that results in sellers gouging credit-card users, without providing any corresponding price reduction to other consumers. Petitioners describe this concern as "hypothetical" (Pet. Br. 39), but both legislative history and real-world experience demonstrate that the risk of such profiteering—to the detriment of overall consumer welfare—is "real," not "mere

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water fees. Gen. Bus. Law § 518. These statutes do not undermine Section 518's goals because credit-card fees imposed by government entities collecting mandatory payments do not threaten the same consumer harms as surcharges imposed by profit-seeking merchants. In any event, these few narrow exceptions for governmental entities do not so pierce Section 518 with exemptions as to fatally undermine New York's consumer-protection interests. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999).

speculation," *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995).

a. Actual experience in jurisdictions that allow credit-card surcharges confirms that excessive credit-card fees are a genuine concern. *See generally Lorillard*, 533 U.S. at 555 (commercial-speech regulations may be justified based on historical experience). For example, when Australia allowed surcharging, the average credit-card surcharge skyrocketed, despite predictions that competition would prevent that result. *See* Marc Rysman & Julian Wright, The Economics of Payment Cards 13 (Nov. 2012). Sellers in jurisdictions that allow surcharging have likewise reaped excessive fees from credit-card users in sectors where it is difficult for consumers to avoid credit-card use, such as air travel. *See* CHOICE, *supra* at 4, 8, 14; Reserve Bank of Australia, *Review of Card Surcharging: A Consultation Document*, at 5 (June 2011). These real-world examples accord with simple common sense: sellers are profit-seeking businesses rather than consumer advocates. They thus have every incentive to "maximize profits," *FCBA House H'rg*, *supra*, at 6-7, including by setting credit-card surcharges as high as the "market will bear." Ian Lee et al., *Credit Where It's Due* 21 (Oct. 2013); *see also* Jean-Charles Rochet & Jean Tirole, *An Economic Analysis of the Determination of Interchange Fees in Payment Card Systems*, 2 Rev. Network Econ. 69, 76 (2003); *see generally Edenfield v. Fane*, 507 U.S. 761, 771-73 (1993) (government may use "studies," reports, and "literature" in *Central Hudson* analysis).

Petitioners and their amici assume that sellers would collect no more in surcharges than the cost of the merchant fees they pay to credit-card issuers (*see*

Pet. Br. 7; Merchant Br. 19-30; J.A. 42-43), but real-world experience does not support this assumption. Credit-card surcharges in jurisdictions that allow them often exceed the size of the merchant fees. *See, e.g.*, Rysman & Wright, *supra*, at 13; Reserve Bank, *supra*, at 5. And surcharges will more frequently exceed any actual credit-card costs in less competitive markets, or in markets where credit-card use is common and consumers are less able to use cash. *FCBA House H'rg*, *supra*, 6-7; Lee et al., *supra*, at 21; Nicholas Economides & David Henriques, *To Surcharge Or Not To Surcharge?* 30 (ECB Working Paper Series No. 1388 Oct. 2011).

b. When surcharges are allowed, excessive fees to credit-card users are not offset by any corresponding price reduction for other customers. (*See* J.A. 86.) *See* 127 Cong. Rec. 4225 (legislators would be "kidding themselves" to believe that sellers imposing surcharges would start "lowering the general price for everybody"). Petitioners assume otherwise, suggesting that, without the prohibition, sellers would reduce their regular prices and levy excess fees only on credit-card users. (J.A. 42-43, 47.) But this supposition is not supported by real-world experience or economic studies. *See* Allen Rosenfeld, Point-of-Purchase Bank Card Surcharges 7-8 (2010); *Lee*, et al., *supra*, at 22 ("[I]t seems especially unlikely that permitting surcharging of payment card customers will result in lower prices for cash customers.").

Instead, economists have found that sellers maintain their prior regular prices and simply impose new surcharges on credit-card users when such surcharges are allowed—and they do so even when, as petitioners assert here (Pet. Br. 7), their past regular prices ostensibly already included their

credit-card costs (*see* J.A. 42, 46). *See* Wilke Bolt & Sujit Chakravorti, *Economics of Payment Cards*, Econ. Perspectives vol. 32(4), at 19 (2008); Todd J. Zywicki, The Economics of Payment Card Interchange Fees and the Limits of Regulation 45-47 (Geo. Mason Univ. L. & Econ. Research Paper Series No. 10-26 June 2010). For example, when Qantas Airlines implemented credit-card fees, it "did not reduce prices for those paying" with cash or check, "resulting in higher costs for credit card users but no price reduction for others." Lee, et al., *supra*, at 21; *see* 127 Cong. Rec. 4225 ("If the Senator believes that the general price level will go down . . . and that the surcharge will not be just an additional cost to the consumer, then I suggest that he believes in the tooth fairy.").

c. A ban on credit-card surcharges directly advances New York's interest in preventing these consumer harms and "is drawn to achieve that interest," *Sorrell*, 564 U.S. at 572. Indeed, a surcharge prohibition may be the "most direct and perhaps the only effective approach" to prevent profiteering because it directly targets—and prohibits nothing more than—the excessive fees that the Legislature intended to curtail. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981) (plurality op.).

The surcharge prohibition also reduces profiteering without burdening "substantially more speech than" necessary. *See Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 478 (1989) The statute regulates the barest commercial speech—the regular price or the credit-card price conveyed to consumers—without restricting any discussions about credit-cards costs or descriptions of whether credit-card users pay more or

less than cash users. See *supra* Point I.C. Nothing in the surcharge prohibition thus "prevents [sellers] from conveying, or [consumers] from hearing," sellers' opinions about merchant fees. *See Fox*, 492 U.S. at 474.

d. Petitioners assert that the surcharge prohibition does not prevent profiteering because it places no cap on sellers' regular prices, meaning that sellers could theoretically impose the same (high) prices on credit-card customers by inflating the regular price in lieu of a surcharge. (Pet. Br. 41.) But as previously explained, sellers do not in practice simply substitute increases to their regular prices for credit-card surcharges. See *supra* Point I.B.2; *see also* Lee et al., *supra*, at 21; Rosenfeld, *supra*, at 3-4. As a result, requiring sellers to convey credit-card prices that are no higher than their regular prices meaningfully constrains sellers' willingness to exact excess fees from credit-card users.

Petitioners also assert that New York could have achieved its anti-profiteering aim through a "narrower" regulation that prohibited only "excessive" surcharges rather than all surcharges. (Pet. Br. 43.) But this assertion wrongly assumes that New York only has an interest in *limiting* the magnitude of the consumer harm caused by credit-card surcharges, rather than *preventing* any harm altogether.

In any event, a surcharge cap would trench on just as much, if not more, speech than New York's statute. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002). Under petitioners' First Amendment theory (Pet. Br. 39), a three-percent cap on credit-card surcharges would prevent a seller that offers a lawful five-percent cash discount from

"labeling" his discount as a five-percent "surcharge." Petitioners alternatively suggest that New York could address its profiteering concerns by limiting the "difference charged between the credit amount and cash amount" (Pet. Br. 43), but that regulation fares no better because, under petitioners' theory, it would prevent sellers from using surcharges or discounts in excess of that permissible difference to express their views.

2. New York's interest in reducing deceptive and unfair sales tactics.

The surcharge prohibition also directly furthers New York's substantial interest in preventing sellers from engaging in "misleading, deceptive, or aggressive sales practices" that undermine a "fair bargaining process," *44 Liquormart*, 517 U.S. at 501 (plurality op.).

a. When sellers can charge excess credit-card prices above the regular price, there is a risk that they will mislead consumers by posting their regular prices to attract customers and then imposing surprise credit-card surcharges at the register. Commercial experience and congressional testimony demonstrate that such deceptive practices are a genuine concern. *See FCBA House Hr'g*, *supra*, at 8; 127 Cong. Rec. 4219. In New York, for example, consumers have been the victims of such bait-and-switch tactics, particularly from gas stations that lure drivers with a single regular price only to charge more per gallon at the pump for credit-card users. (J.A. 134-138.) And in Australia and the United Kingdom, where surcharges are permitted, sellers have often failed to reveal credit-card surcharges until it is too late for consumers to change their

minds about a purchase, such as when they have already eaten a meal or taken a taxi ride. *See* Office of Fair Trading, Payment surcharges: Response to the Which? super-complaint 6 (July 2012) (*"OFT Response"*); *see id.* at 31-33; CHOICE, *supra*, at 4, 14-15.

Even when sellers disclose credit-card surcharges ahead of time, such disclosures "may not be sufficient . . . to prevent something akin to the troublesome 'bait and switch' technique." *FCBA Senate Hr'g*, *supra*, at 85-86. As economists, consumer advocates, and federal legislators have explained, the unique prominence that consumers give to a seller's regular price in practice leads them to anchor their expectations on that price even when there is some disclosure of a potential surcharge. *See CDA Senate Hr'g*, *supra*, at 18; *OFT Response*, *supra*, at 5-6, 31-33 (explaining importance of "headline price" to consumers); Lee et al., *supra*, at 22. Economists and consumer groups have explained that "merchants recognize" and can take advantage of the powerful role that regular prices play in retail transactions by setting and conveying lower regular prices—a tactic that will in practice lure customers even when a merchant also discloses that a surcharge may later apply. Lee et al., *supra*, at 22; *see also OFT Response*, *supra*, at 28 (explaining that sellers use surcharging as a "deliberate strategy" to make prices less transparent even when there is some disclosure of a surcharge).

b. Contrary to petitioners' assertions (Pet. Br. 39-40), discounting is not as likely as surcharging to incentivize merchants to exploit consumers through "hidden costs" and thus does not undermine the reasonableness of Section 518. Put simply, sellers

have little incentive to hide discounts; to the contrary, sellers have every reason to broadcast discounts early and clearly to "bring consumers into the store." *CDA Senate Hr'g*, *supra*, at 27. Cash discounts thus create a "more transparent" and "consumer-friendly dynamic" than credit-card surcharges do. Lee et al., *supra*, at 22.

The surcharge prohibition's consumer-protection goals are also not undercut by the statute's application to credit-card surcharges but not to other charges. *See* Pet. Br. 41. States are entitled to make "legislative judgments" about which fees are more likely to motivate sellers to abuse consumers. *See United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993).

Section 518 does not fail to advance New York's goals simply because other state statutes also protect consumers. Different statutes are "fully capable of coexisting" and serving important government interests even though they may overlap. *United States v. Batchelder*, 442 U.S. 114, 122 (1979). In any event, the false advertising and anti-deception statutes petitioners rely on are not coextensive with the surcharge prohibition. (*See* Pet. Br. 42.) While these laws prohibit outright fraud and misleading conduct, they do not necessarily address more subtle but still harmful practices that exploit consumers' tendency to anchor their expectations on regular prices—such as a last-minute disclosure of a credit-card surcharge before a sale is finalized. Moreover, Section 518 imposes different penalties—including criminal sanctions—that the anti-deception and false-advertising statutes do not authorize. *Compare* GBL § 518, *with id.* §§ 349(b), 349(d), 350-d. The First Amendment does not bar New York from

"deciding that the civil penalties" and provisions of other statutes "were not enough to address the problem" of credit-card surcharges. *See Dana's R.R.*, 807 F.3d at 1256 (Carnes, C.J., dissenting).

3. New York's interest in stimulating its retail economy.

The surcharge ban also directly furthers New York's interest in protecting its economy. First, Section 518 encourages greater uniformity in the pricing schemes that sellers adopt, enabling consumers to easily compare prices and avoiding consumer confusion from facing "different types of pricing systems from one store to the next." *FCBA Senate Hr'g*, *supra*, at 8; *see FCBA House Hr'g*, *supra*, at 8 ("Consumers should not have to endure the confusion which would result from a wide variety of methods of advertising the price of an item."); CHOICE, *supra*, at 31 (explaining concerns "about surcharging making consumers more 'captive'" because of difficulties comparing prices). Indeed, many sellers that objected to one of the private antitrust settlements recognized that credit-card surcharging harms consumers because surcharges "encourage consumer confusion [and] taint shopper experience." Objection of Foot Locker, Inc. ¶ 19, *Interchange Fee*, 2013 WL 6510737 (No. 05-MD-1720); *see* Objection of Darden Restaurants, Inc. ¶¶ 11-12, *Interchange Fee*, 2013 WL 6510737 (No. 05-MD-1720, ECF No. 2587) (customers "find surcharging confusing" and often "have no option to 'return'" a product if surcharge is "unacceptable"); Decl. of Brooks Brothers Group, Inc. ¶ 5, *In re Antitrust Litig.*, 2013 WL 6510737 (No. 05-MD-1720, ECF No. 2538-4) ("[s]urcharging is not customer

friendly" and consumers "would vociferously question the practice").

Second, the surcharge prohibition prevents a practice that may deter credit-card use and thereby reduce the use of a payment method that provides many efficiencies and benefits to consumers, sellers, and the economy as a whole. A substantial body of economic literature establishes that credit cards are less expensive and more efficient than cash or checks once the benefits of credit-card systems are taken into account. *See, e.g.*, James McAndrews & Zhu Wang, *The Economics of Two-Sided Payment Card Markets* 5-6, 25-26 (Fed. Reserve Bank of Richmond Working Paper 12-06 2012); Zywicki, *supra*, at 7-26; *see also* 127 Cong. Rec. 4219. Credit-card surcharges can thus discourage the use of an efficient and useful payment platform. *See* Lee et al., *supra*, at 24-25.

Petitioners assert that these economic interests are illegitimate because New York seeks to achieve them by "blindfold[ing]" the public and maintaining "consumer ignorance." (Pet. Br. 38.) But this argument wrongly assumes that the surcharge prohibition affects consumer behavior by blocking information supposedly conveyed through extra charges or price reductions. (*See* Pet. Br. 38.) For the reasons explained, the statute does not limit any such information. See *supra* Point I.C.

C. Section 518 May Also Be Upheld as a Valid Consumer-Disclosure Law.

The United States explains that the prior federal surcharge prohibition was a valid consumer-disclosure law under *Zauderer*, and suggests that a remand is necessary to determine whether New York's law can

be upheld on that ground as well. (U.S. Br. 21-33.) Remand is unnecessary here. For purposes of a *Zauderer* inquiry, New York's law parallels the prior federal surcharge prohibition in all relevant respects, and there is no jurisdictional barrier to this Court relying on *Zauderer* to affirm the decision below on this alternative ground.

1. As the United States explains, the federal surcharge prohibition ensured that consumers would be "adequately informed" of the highest price "in dollars and cents" that a seller would charge on account of credit-card use. (U.S. Br. 23, 26.) New York's surcharge prohibition likewise guarantees that consumers will be exposed to the highest price that they could be charged for using a credit card, although it achieves that result through the ordinary meaning of the term "surcharge" (as an increase above the regular price) rather than through express definitions. As under the federal statute, a seller that has a single "tagged or posted" price can comply with New York's law by charging no more than that price for credit-card customers. And as under the federal statute, a seller that has no single regular price can comply with New York's law by disclosing a dollars-and-cents price for credit-card users. See *supra* Point I.B.1.c.

The purpose and legislative history of New York's surcharge prohibition further confirm that New York's law was intended to parallel the prior federal surcharge ban. As explained (see *supra* at 12-13), New York's Legislature enacted the surcharge prohibition and modeled it on the federal law to continue the same consumer-protection policies as Congress had pursued—including protecting consumers from the misleading prices that they

would face if a seller posted a single regular price and only later imposed an additional surcharge for customers using credit cards. (U.S. Br. 8-9, 23-24, 28.) Accordingly, for the reasons set forth by the United States, the prior federal statute can be understood as a constitutional disclosure requirement under *Zauderer*, and New York's law is a valid disclosure requirement for the same reason.

2. To be sure, as the United States observes (U.S. Br. 33), the parties did not specifically address the application of *Zauderer* in the circuit. The court of appeals had no occasion to pass on this issue in any event, because it concluded as a threshold matter that New York's surcharge prohibition was not speech subject to the First Amendment at all. (Pet. App. 18a-19a & n.7.)

This Court may nonetheless address the question and affirm the decision below on the alternative ground that, if Section 518 is deemed to be a speech regulation, it survives scrutiny as a permissible disclosure requirement for the reasons given by the United States with respect to the parallel federal surcharge prohibition. There is no jurisdictional bar to affirming the decision below on alternative grounds. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970). The application of *Zauderer* is a pure legal question that does not rely on any additional factual or procedural developments. And although the parties did not rely on *Zauderer* in the circuit, they fully briefed and presented to the courts below the same legislative concerns about consumer deception and confusion that satisfy both *Zauderer*'s disclosure rule and *Central Hudson*'s commercial-speech test. There is thus no barrier to affirmance based on *Zauderer*.

III. The Surcharge Prohibition Is Not Unconstitutionally Vague

All that due process requires is that ordinary people applying common sense can understand what conduct Section 518 prohibits. *See United States v. Williams*, 553 U.S. 285, 304 (2008). Petitioners assert that Section 518 is unconstitutionally vague because it is impossible to distinguish between a permissible "discount" and an impermissible "surcharge" under the statute. (Pet. Br. 26.) But both the "everyday understanding" and "regular usage" of these terms, *Lopez v. Gonzales*, 549 U.S. 47, 53-54 (2006), provide sufficient clarity to satisfy due process: a surcharge is an addition to a seller's regular price, while discounts are a reduction from that price.

This familiar distinction between surcharge and discount is more than enough "to provide a person of ordinary intelligence fair notice of what is prohibited." *Williams*, 553 U.S. at 304. In the vast majority of retail transactions, a seller's regular price is "readily ascertainable" (Pet. App. 15a), and it would be obvious whether a deviation from that price is a surcharge or a discount. See *supra* Point I.A, I.B.1 (explaining difference). By contrast, if a seller has no regular price, then Section 518 does not apply. See *supra* Point I.B.1.c. Due process is thus satisfied.[8]

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[8] Petitioners are wrong to assert (Pet. Br. 46-47) that the Attorney General has altered his interpretation of Section 518 during the course of this litigation. The Attorney General has consistently maintained that the statute prohibits only the conduct of imposing a surcharge rather than speech. (Dist. Ct. Dkt. No. 27, at 36-37; Pet. App. 18a-19a, 73a). In addition, as

(*continues on next page*)

As with their First Amendment claim, petitioners stake their vagueness challenge on abstract pricing schemes constructed to avoid the commercial reality of regular prices. (*See* Pet. Br. 49-50.) But "speculation about possible vagueness in hypothetical situations" cannot sustain a due process vagueness claim, particularly in this preenforcement challenge.[9] *Hill v. Colorado*, 530 U.S. 703, 733 (2000). Moreover, a statute is not vague simply because it may be difficult to apply at the margins. "Close cases can be imagined under virtually any statute." *Williams*, 553 U.S. at 306. Such borderline cases are "addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Id.*

The only reported criminal prosecution under Section 518 is best understood as a failure by the prosecution to satisfy this proof requirement. In that prosecution, the trial court had initially rejected a pretrial vagueness challenge to Section 518, holding that the statutory term "surcharge" could be readily understood according to its "everyday, commonsense meaning," *People v. Fulvio*, 135 Misc. 2d 93, 95 (N.Y.

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any responsible litigant would, the Attorney General has presented alternative legal arguments to defend the statute if the courts were to conclude that the surcharge prohibition does implicate protected speech. Contrary to petitioners' assertions, these arguments are not inconsistent interpretations of Section 518, but rather alternative justifications for the statute under different legal doctrines. These arguments do not remotely suggest that the statute is unconstitutionally vague.

[9] Petitioners' invocation of the First Amendment (Pet. Br. 44) does not support their reliance on such hypotheticals because a First Amendment overbreadth claim is not available for regulations of commercial speech. *See Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-97.

Crim. Ct. 1987). But after the defendant (a gas station operator) was convicted of violating the statute, the court set aside the conviction. While the court purported to find the statute itself unconstitutionally vague, its discussion of the "facts proved at trial" demonstrates that the actual problem was the prosecution's inability to establish the defendant's regular gas prices beyond a reasonable doubt—an essential predicate to proving that the defendant had illegally exceeded that baseline. *People v. Fulvio*, 136 Misc. 2d 334, 338-39 (N.Y. Crim. Ct. 1987). In particular, the court noted that there was conflicting evidence about "whether [signs] clearly set forth 'credit' prices and 'cash' prices," and that an employee had "interchangeabl[y]" communicated the credit-card price as "five cents 'extra'" and the cash price as a "nickel less." *Id.* at 339, 342.

Fulvio thus demonstrates, at most, that a prosecutor may not satisfy Section 518's evidentiary requirements in a particular case. Contrary to petitioners' argument, the failure of one criminal prosecution does not render the statute impermissibly vague in every instance. Because Section 518's prohibition against the imposition of credit-card surcharges is clear "in the vast majority of" cases, *Hill*, 530 U.S. at 733, the statute is sufficiently clear to satisfy due process.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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RECORD AND BRIEF

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EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM, and DAVID ROSS, *Petitioners*,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; ERIC GONZALEZ, in his official capacity as Acting District Attorney of Kings County, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Samuel Merchant, *Merchant Restraints: Credit-Card Transaction Surcharging and Interchange-Fee Regulation in the Wake of Landmark Industry Changes*, 68 Okla. L. Rev. 327 (2016) 15

REPLY BRIEF FOR PETITIONERS

Suppose you own a small deli in New York. You accept credit cards, but that comes at a cost: swipe fees. You could pass these fees on to all your customers, by setting higher prices across the board. Or you could charge more for purchases made by credit card. You opt for the latter. You decide to charge two prices for a pastrami sandwich: $10 in cash, $10.20 with a credit card.

So far, so good. Dual pricing of this sort is legal everywhere. But now you need to inform your customers of the two prices. You consider the options:

A.	Pastrami sandwich: $10 cash price / $10.20 credit-card price
B.	Pastrami sandwich: $10 cash price $0.20 surcharge per item added to credit-card purchases
C.	Pastrami sandwich: $10 cash price 2% surcharge added to credit-card purchases
D.	Pastrami sandwich: $10.20 credit-card price $0.20 discount per item off cash purchases

In forty states, any of these options is a permissible way to truthfully advertise your prices. But not in New York. The state permits merchants to characterize the price difference as a cash discount but makes it a crime to characterize it as a credit-card surcharge.

How do you proceed? Choose option B or C, and you could find yourself in the crosshairs of New York's Attorney General, as happened to dozens of small merchants in recent years. They told customers that a product cost, for example, $3.45 and $0.05 extra for using credit, rather than $3.50 and $0.05 less for cash. JA 107,

115, 124. Even though they told their customers both the cash and credit-card prices, and did so at the same time, an Assistant Attorney General told the merchants that this was illegal. He made them pay fines and gave them a "script," saying: "You can charge more for a credit card all you want, but you have to say that this is the cash discount rate." JA 107, 115.

Choose option A and you could still find yourself arrested, prosecuted, and convicted—as happened to a gas-station owner shortly after the law's enactment. Although the station had signs clearly advertising both prices, the cashier let slip (in a conversation with a customer) that gas cost "five cents extra" with a credit card, instead of saying that it was a "nickel less" in cash. *People v. Fulvio*, 517 N.Y.S.2d 1008, 1013 (N.Y. Crim. Ct. 1987). That made the owner a criminal.

As a result, only option D—which you believe to be by far the least effective way of highlighting the cost of credit to consumers—appears somewhat safe. Some merchants choose this option, and "try to be as careful as [they] can to avoid characterizing the price difference as a 'surcharge.'" JA 61. Others refrain from dual pricing altogether because they are "concerned about the difficulty of controlling the language [their] employees would use" and are unwilling to "take the risk" of prosecution. JA 48, 53, 58.

The threshold question in this case is whether this law regulates speech or conduct. Everyone agrees that a law restricting only the prices merchants may charge is a regulation of conduct. And everyone agrees that a law restricting only the way those prices may be communicated is a regulation of speech. The question is: On which side of the line does New York's law fall?

New York takes the position that its law is a "direct price regulation that controls how sellers set prices and

collect money from their consumers, not what they may or may not say about their prices." Resp. Br. 22. But its law does *not* control "how sellers set prices and collect money." The price of a sandwich is the amount that is charged for it. That is what makes a price-control law a regulation of economic conduct: it regulates the amount of money a merchant may charge for an item (or to whom). New York's law doesn't do that. The deli owner may charge $10 for cash and $10.20 for credit. Those prices (read: amounts) are legal. So too were the prices charged by the gas station in *Fulvio* and all the mom-and-pop merchants targeted by the state in recent years.

The state's brief says virtually nothing about its recent enforcement efforts. It is no surprise why: Those merchants were told that they could bring themselves into compliance by changing only how they *communicated* their prices—not the amounts of the prices themselves. Any law that makes criminal liability turn solely on words used to convey truthful, lawful prices is a regulation of speech, subject to scrutiny.

This law does not come close to surviving First Amendment scrutiny. The state claims that the law serves consumer-protection aims. But the state introduced no supporting evidence below, and no consumer group agrees. And the law is both too broad and too narrow to achieve such aims—too broad because it bans truthful speech; too narrow because it exempts the state and allows large price differentials if characterized as discounts. If New York is really concerned about gouging and bait-and-switch tactics, there is an easy solution: Let merchants characterize the price difference however they please but cap the amount and require disclosure (or just enforce false-advertising laws).

The United States, for its part, agrees that New York's law regulates only speech. U.S. Br. 19-20. Yet it

proposes a remand to allow the state to press an argument it abandoned below: that the law is a disclosure requirement—not a *conduct ban*, as the state says, but a *speech mandate*. Nobody makes an attempt to show that New York's law is actually such a law. The hallmark of a disclosure requirement is clarity about what speech is being mandated. Even the lapsed federal precursor was hopelessly unclear; it was apparently never enforced and caused widespread confusion before it was scrapped.

New York's law is, if anything, even more vague. Armed with only the statutory text and enforcement history, no merchant could be confident that she can communicate dual pricing in a lawful way. And instead of clearing up the confusion by answering the questions we posed in our opening brief (at 49-50)—questions that *every* dual-pricing merchant will confront—the Attorney General dismisses them (at 57) as "speculation." That is no way to defend a law that criminalizes speech.

ARGUMENT

I. New York's no-surcharge law makes liability turn on how prices are communicated to consumers—not the prices themselves—and thus regulates speech, not economic conduct.

A. The law regulates *only* speech.

New York stakes its defense primarily on its argument that the criminal no-surcharge statute is a "classic form of price regulation that implicates no First Amendment concerns." Resp. Br. 1. That argument, in turn, rests on the state's claim that the law "regulates the economic conduct of increasing prices on account of a customer's credit-card use," making the law (in the state's view) "similar to a price ceiling." *Id.* at 1-2.

But, as the state later concedes, the law is not at all like a price ceiling because it "does not restrict the final

prices that sellers may charge" for *any* product—either for cash or credit, or for the difference between them. *Id.* at 31. To the contrary, the law allows a merchant to charge two different amounts for cash versus credit, set at whatever amounts the merchant wishes, *see id.* at 36—but only if the difference between them is framed as a cash "discount" rather than a credit-card "surcharge." Liability thus turns entirely on speech, not conduct—as the law's "purpose and practical effect" make clear. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011).

1. Practical effect. As a practical matter, what does the law regulate if not speech? The state says that it "prohibits sellers from collecting additional money, in excess of the usual or regular price, from consumers who pay with a credit card." Resp. Br. 22. "The relevant conduct," as the state sees it, "is not simply the final price charged to credit-card customers, but rather the relationship between that price and the regular price," which (it insists) provides an "objectively ascertainable baseline" as the "usual or normal price." *Id.* at 29-30.

The first court to confront that argument recognized it for what it is: "semantic gyration." *Fulvio*, 517 N.Y.S.2d at 1015. To see why, return to the deli owner who charges two prices for a pastrami sandwich: $10 for cash, $10.20 for credit. Which one is the normal price? The answer—and criminal liability—hinges on how the prices are *communicated*. *See* Resp. Br. 28 (defining regular price based on what is "conveyed to buyers," not what is charged).

Say that the sandwich costs $10 with a $0.20 credit-card surcharge, and the answer is $10. Say that it costs $10.20 with a $0.20 cash discount, and the answer is $10.20. Say that it costs $10 for cash and $10.20 for credit, and the answer (maybe?) depends on how an employee characterizes the difference in a conversation. *Com-*

pare Fulvio, 517 N.Y.S.2d at 1010 (involving criminal conviction of gas-station owner whose cashier said that credit-card purchases "cost more") *with* Resp. Br. 38-39 (claiming that "a seller is free to 'tell [its] customers' that a credit-card user ultimately pays 'more'").

There is "no real-world difference between [these] formulations" in terms of the economic conduct they describe. *Dana's R.R. Supply v. Att'y Gen.*, 807 F.3d 1235, 1245 (11th Cir. 2015). And yet the first is a crime, the second is not, and the third is anyone's guess. Because liability "depends on what [merchants] say," the law "regulates speech," and only speech. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010); *see* U.S. Br. 19 ("Because Section 518 addresses the *communication* of an otherwise-permissible pricing scheme, rather than the pricing scheme *itself*, it is properly considered a regulation of speech."). Put another way, the law does not regulate the setting of prices by merchants, but kicks in only *after* they have been set, by preferring one way of labeling them over another.

The state's own lawyers have demonstrated as much in their efforts to enforce the law. When one of them placed an anonymous phone call to a small heating-oil company, pretending to be a customer, the owner said that oil cost $3.45/gallon if paying in cash, with a $0.05/gallon "surcharge" for paying by credit. JA 106. The Attorney General's office told the merchant that he had violated the law, made him sign an agreement to stop characterizing the cost of credit as a surcharge, and gave him "a script of what [he] could tell customers." JA 106-07. The state further told the merchant that he could keep charging the same amounts, but he "could not say that [h]e charge[s] more for using a credit card." *Id.* at 108. He had to say that oil cost $3.50/gallon if paying by credit, with a $0.05/gallon cash "discount." *Id.* at 107. A

slew of other merchants had similar experiences, and were told the same thing. JA 115, 117-33.

The state's brief barely mentions these recent enforcement efforts, devoting a total of two sentences to them. In the first sentence, the state alludes to bait-and-switch tactics: It claims that these merchants had quoted a single price for their products and "*only later*" informed customers of the surcharge when they "sought to pay with a credit card." Resp. Br. 26-27. That is not what the record says. The unrebutted evidence makes clear that these merchants were targeted for violating the law even though they conveyed the cash and credit-card prices "*at the same time*"—before the customer was set to pay. JA 106; *see also* JA 114-15, 124. And the Attorney General's office told them they could not frame the price difference as a surcharge—regardless of when it was disclosed. JA 108, 119, 125. The petitioners here likewise wish to communicate their prices ahead of time, "before a payment method has been identified." Resp. Br. 28; *see* JA 41-62, 101-04. Their goal is to fully *inform* consumers in the hopes that they will then use a *cheaper* payment method, not to hoodwink them into using a credit card.

The second sentence appears in a footnote: "Contrary to petitioners' mischaracterization, it was the companies' imposition of an additional fee on top of the usual or regular price that triggered enforcement of Section 518—not their failure to follow a 'script' to describe their pricing." Resp. Br. 27 n.4 (citation omitted). This is more wordplay. For starters, the description of the Attorney General's enforcement efforts is neither a mischaracterization nor is it even ours; it is based on the firsthand experience of merchants (none of whom are parties to this litigation) as contained in sworn, unrebutted declarations. *See* JA 105-33. And, more to the point, what constitutes "an additional fee on top of the usual or regular price" is entirely dependent on how the prices are

communicated. As the United States puts it: The law "prescribes not the commercial practices a merchant must follow, but the way in which the merchant may communicate those practices to the public." U.S. Br. 19.

New York's attempt to explain away its criminal prosecution in *Fulvio* is even more strained. The state says that the case is "best understood as falling within [a] category of cases" in which there is "no occasion to apply" the law because "there is no meaningful basis to determine whether a seller has imposed a 'surcharge,'" given the "absence" of a usual or normal price. Resp. Br. 30. Later, it says that the same case is actually "best understood" as something else: "a failure by the prosecution to satisfy" the "requirement of proof beyond a reasonable doubt." *Id.* at 57.

But *Fulvio* is not hard to understand. The "actual problem" in the case wasn't the "prosecution's inability" to meet its burden of proof. *Id.* at 58. The prosecution *successfully* obtained a conviction. *See* 517 N.Y.S.2d at 1009. The problem, rather, was that the conviction had to be set aside as unconstitutional because, under the statute, "precisely the same conduct by an individual may be treated either as a criminal offense or as lawfully permissible behavior depending only upon the *label* the individual affixes to his economic behavior." *Id.* at 1011. New York has identified no instance of its law ever being enforced in a way that *doesn't* present this problem.

Instead of facing up to its enforcement history, the state asks this Court to shield its law from scrutiny because merchants "remain free to communicate their views about credit-card costs," in conversations with customers, "in any way they see fit." Resp. Br. 20. The state even claims that merchants may tell customers that it costs "more" to use a credit card, *id.* at 38—the opposite of what it told merchants a few years ago. *See* JA

108 ("The Attorney General always told us that we could not say that we charge more for using a credit card."). The law, the state now contends, simply prevents merchants from "convey[ing]" their prices—"by tag or sign or other means"—in the wrong way. Resp. Br. 24, 28.

This is no defense to a First Amendment challenge. "The Government's assurance[s]" are "pertinent only as an implicit acknowledgment" of the statute's "constitutional problems." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Even assuming the law is so limited (and the enforcement history shows that it is not), the First Amendment protects more than just conversations. The way a merchant chooses to communicate price information to consumers—on labels, signs, advertisements, and the like—is *itself* speech. And it's not just any speech, but speech at the heart of the commercial-speech doctrine. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976). As Judge Rakoff put the point: "Pricing is a routine subject of economic regulation, but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment." Pet. App. 74a. The state has no response.

2. Purpose. The state also offers no response to the history demonstrating that both supporters and opponents of a surcharge ban understood its purpose as targeting speech. Pet. Br. 8-16, 30-31. Consumer advocates opposed it because "the term 'surcharge' makes credit card customers particularly aware" of the cost while "discount" "downplays the truth." *Id.* at 10-11. Banks favored it for this very reason: a surcharge "talk[s] against the credit industry." *Id.* at 12. Ignoring this history, New York now claims that the law was designed to protect consumers from various risks—the "risk that [merchants] will mislead consumers by posting their regular prices to attract customers and then imposing

surprise credit-card surcharges"; the "risk" that allowing surcharges as well as discounts could cause "consumer confusion"; and the risk of "lur[ing] customers" with "bait and switch." Resp. Br. 7, 8, 43, 49. We say more about these justifications in Part II, but for now it is enough to see that each is about *speech*, not conduct. As Judge Sutton has explained, something "cannot simultaneously be non-communicative" and "yet pose the risk of *communicating* a misleading message." *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 510 (6th Cir. 2008).

B. New York and its amici cannot save the law from scrutiny by comparing it to different laws that actually regulate economic conduct.

Because the law cannot survive scrutiny, the Attorney General spends much of his brief resisting it. But rather than confront the purpose or practical effect of the no-surcharge law, the state and its amici rely on cases and hypotheticals about very different laws—none of which makes liability turn on labeling or otherwise has the purpose or practical effect of regulating semantics.

Take price-control laws. Resp. Br. 23-24. They regulate conduct because they prohibit charging more or less than a certain amount for a good or service. *See, e.g.*, *Munn v. Illinois*, 94 U.S. 113, 125 (1876) (law "fix[ing] a maximum [] charge"). The no-surcharge law, by contrast, does not regulate what anyone may charge for anything.

Now take the requirement that telecommunications carriers charge schools and libraries "rates less than the amounts charged for similar services to other parties," with the difference set by a federal agency. 47 U.S.C. § 254(h)(1)(B); *see* Resp. Br. 24. That law regulates conduct because it dictates the relationship of the "amounts charged" to one group of people versus another. The no-surcharge law does no such thing.

Next up is *National Association of Tobacco Outlets, Inc. v. City of Providence*, which involved a prohibition on "reducing prices" for cigarettes through "coupons and certain multi-pack discounts." 731 F.3d 71, 74 (1st Cir. 2013). The First Circuit upheld the law because it does not "restrict[] retailers or anyone else from communicating pricing information." *Id.* at 77. Instead, it bans differential pricing—a regulation of conduct—by requiring retailers to charge all consumers the same amount for every pack of cigarettes, regardless of whether the consumer uses a coupon or buys multiple packs. That is nothing like the no-surcharge law, which *allows* differential pricing based on how the consumer pays but regulates only how the difference is communicated.

Then there is the law banning credit-card companies from charging fees to cardholders who pay their bills electronically. 15 U.S.C. § 1637(*l*). That law regulates conduct because it forbids charging different amounts to consumers based on their payment method. The no-surcharge law does the opposite. And unlike "a consumer's credit balance," Resp. Br. 25, which reflects how much money the consumer owes to date, a dual-pricing merchant's "regular price" is solely a function of how the merchant conveys its prices to consumers.

Anti-gouging laws are even further afield. They regulate conduct because they prevent merchants from "charging grossly excessive prices" during market disruptions, N.Y. Gen Bus. Law § 396-r(1), requiring merchants to "adhere to [their usual] prices even when market conditions would allow for sharp price increases." Resp. Br. 32. A merchant who violates this law charges consumers too much money; she cannot bring herself into compliance just by changing how she characterizes her prices. Not so with the no-surcharge law.

The state also hypothesizes an anti-gouging law that would cap credit-card surcharges at 5%. *Id.* at 25. If this law were to apply regardless of how the price difference were conveyed (whether as a credit-card surcharge or cash discount), then it would be a regulation of conduct. But if the state were instead to *permit* large price differentials if conveyed as a cash discount, *see id.* at 48-49, then the law would regulate speech and the state would have to justify it if challenged by a merchant.

The state's amicus, Florida, adds a couple of alcohol laws to the list. *See* Fla. Br. 32-34. But neither is like the no-surcharge law. As to the first: It is true that, in some states, "bartenders may not offer 'free' alcoholic drinks, but they may sell discounted drink-and-food combinations and offer free food and entertainment." *Id.* at 32-33. But that is not the same conduct. In the latter scenario, customers have to *spend money* to receive drinks (by buying meals that include drinks). In the former, customers may receive drinks for *free*. Under the no-surcharge law, however, customers spend the same amount of money for the same thing in every scenario; the only difference is the merchant's speech.

As to the second: Florida suggests that laws prohibiting happy-hour discounts would be threatened. *Id.* at 33 n.19. It is hard to see how. The conduct those laws seek to prohibit is lowering alcohol prices for a short period of time, however communicated. But if a state were to interpret its law (oddly) to *permit* this conduct so long as the bar does not characterize its lower prices as "happy hour" prices but as new, one-hour-long "regular prices"—the way that New York permits merchants to charge more for credit so long as they do not characterize the additional amount as a surcharge—then the law would regulate speech and would have to satisfy scrutiny. The key question is whether liability turns on labeling: If so, scrutiny applies. If not, it doesn't.

As this discussion illustrates, our position does not threaten the basic proposition that price restrictions are regulations of economic conduct, or somehow "erase[] the line between protected speech and commercial conduct." Public Citizen Br. 3. Nor is it our position that "surcharges and discounts are always identical"—in every context—as New York repeatedly suggests. Resp. Br. 16; *see, e.g., id.* at 1, 5, 27. Of course they're not. A credit-card discount is not the same thing as a credit-card surcharge. In *this* specific context, however, credit-card surcharges and cash discounts describe the same conduct: charging a higher price for using a credit card than for using cash. Allowing one but criminalizing the other is thus a regulation of speech, not conduct.

II. New York's consumer-protection rationales are meritless.

New York has not come close to meeting its "heavy burden" of satisfying *Central Hudson* scrutiny. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (plurality). To start, the state introduced no evidence below. That alone is fatal because, even assuming that the state's purported aims are "substantial in the abstract," *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), "anecdot[es] and educated guesses" are not enough. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995).

Evidence aside, the state's problem runs deeper: Ready alternatives exist that would be both *less restrictive* of speech and *more effective* in addressing the state's supposed consumer-protection aims. The state could cap the amount of the price difference (regardless of how it is characterized), require clear disclosure, or enforce existing false-advertising laws. Instead, the state went straight to criminalizing truthful speech.

1. **Profiteering.** New York's first rationale (preventing profiteering) illustrates the point. A law that capped the price difference between cash and credit—however expressed—would "far more effectively achieve" any anti-profiteering interest, without restricting protected speech. *44 Liquormart*, 517 U.S. at 530 (O'Connor, J., concurring). Indeed, the state already authorizes "reasonable" fees "not to exceed the costs incurred" for state water or sewer bills paid by credit card. *See* N.Y. Pub. Auth. Law § 1045-j(4-a)(b). If profiteering were really the concern, why not follow this model instead of criminalizing speech?

The state offers no response except to claim that a "surcharge cap would trench on just as much, if not more, speech." Resp. Br. 48. But as long as the cap regulated the price difference no matter how it was characterized, the law would restrict *no* protected speech. The no-surcharge law, however, allows an unlimited price difference, but regulates only how it is characterized. "Before a government may resort to suppressing speech to address a policy problem, it must show that regulating conduct has not done the trick or that as a matter of common sense it could not do the trick." *BellSouth*, 542 F.3d at 508; *see Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("regulating speech must be a last—not first—resort"). The state has not made this showing.

Nor has it explained why it permits a merchant to charge, for example, $100 for cash and $200 for credit if communicated as a discount. It cites two recent articles extoling the benefits of credit cards as a policy matter, but nothing that would support its decision to allow merchants to charge an excessive price difference if framed in a certain way. Resp. Br. 48.

The state also attempts to carry its burden by relying on Australia's experience with price-transparency reforms beginning in 2003. Resp. Br. 45. But that argument cites "outdated sources" that "predate" reforms "limit[ing] surcharges to 'the reasonable cost of acceptance'"—precisely the sort of narrowly tailored alternative that would more effectively address any profiteering concerns. Samuel Merchant, *Merchant Restraints*, 68 Okla. L. Rev. 327, 375 (2016); *see* Levitin Br. 17-20. These more recent reforms have reduced the cost of swipe fees in Australia by nearly half—and hence reduced the amount consumers pay to use credit. Levitin Br. 21; Frankel Br. 9-10.

2. Preventing deceptive tactics. The state's anti-deception interest similarly fails to overcome the obvious objection: If New York were really concerned about deception, why wouldn't a targeted false-advertising or disclosure regime *better* serve that interest—and do so without restricting truthful speech?

On this question, too, the state has no good answer. It says (at 49) that credit-card surcharges (unlike cash discounts) pose a greater "risk that they will mislead customers." But "[s]tates may not place an absolute prohibition" on information that is merely "potentially misleading … if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. 191, 203 (1982).

The state also repeatedly tries to convey the impression that its law targets only "bait-and-switch tactics," Resp. Br. 49—"upward adjustment[s] relative to a *previously conveyed* regular price," *id.* at 26-27. But merchants targeted by the state had notified customers of *both* cash and credit prices "at the same time," JA 106, and were "up front" about the additional cost. JA 114-15,

124. The petitioners likewise want to "clearly and transparently" disclose truthful information about lawful dual pricing. JA 60-61. Because "conviction may be had under [New York's law] regardless" or whether merchants' speech is deceptive, *Fulvio*, 517 N.Y.S.2d at 1011, the law "sacrifices an intolerable amount of truthful speech about lawful conduct," *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 194 (1999).

So "why not first enforce existing state law"? *BellSouth*, 542 F.3d at 508. The state's response seems to be that the no-surcharge law supplements existing false-advertising laws with "criminal sanctions." Resp. Br. 51-52. As a defense of a statute that reaches *truthful speech*, that is hardly a point in the state's favor. Criminal statutes demand more—not less—scrutiny. And to the extent that the state wants to enforce this law to criminalize only false advertising, its ability to do so is not affected by petitioners' as-applied challenge.

3. Stimulating the retail economy. Finally, the states claims that its law "stimulat[es] its retail economy" by reducing the "confusion" that would arise from allowing merchants to frame the price difference as a surcharge. *Id.* at 52-53. But suppressing speech that highlights the cost of credit because it would "deter credit card use," *id.*, is just another way of rationalizing keeping consumers "uninformed for their own protection," *Rubin*, 514 U.S. at 497 (Stevens, J., concurring). That interest "does not suffice to justify restrictions of protected speech in *any* context," *id.*, and is "*per se* illegitimate," *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring). The First Amendment does not permit the state to criminalize speech to "keep[] the public in ignorance." *Va. State Bd.*, 425 U.S. at 770.

III. Because it prohibits rather than mandates speech, New York's law is not a disclosure requirement.

The United States agrees that, because liability under New York's law turns on "the *communication* of an otherwise-permissible pricing scheme, rather than the pricing scheme *itself*, it is properly considered a regulation of speech." U.S. Br. 19. But its brief then takes an unexpected turn. It proposes a remand to allow New York another shot at an argument it abandoned below: that its surcharge ban is in fact a disclosure requirement.

The United States, however, takes no position on whether New York's ban really *is* a disclosure law, and instead offers reasons why New York's law may be materially different from the short-lived (and apparently never-enforced) federal precursor. *Id.* at 34. Nevertheless, the United States asks this Court to opine, in the abstract, that "a *sufficiently specific* law requiring only that a merchant display a credit-card price alongside the cash price *would* be a valid consumer-disclosure regulation." *Id.* (emphasis added); *see also id.* at 15-16 (stating that "[i]t is unclear" whether section 518 is such a law).

New York, for its part, says a "[r]emand is unnecessary" because its "surcharge prohibition"—the same prohibition it contends is a *ban on conduct*—may be viewed as a *speech mandate* and hence upheld as "a valid disclosure requirement" under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985), "for the reasons set forth by the United States." Resp. Br. 54-55.

The short answer to both the United States and New York is that there is no need for a remand or a *Zauderer* analysis because New York's law is not a disclosure requirement. This Court's cases recognize the "material differences between disclosure requirements and outright prohibitions on speech." *Zauderer*, 471 U.S. at 650.

Because "disclosure requirements trench much more narrowly on an advertiser's interests," they pass muster if "reasonably related" to a state interest. *Id.* at 651. By contrast, commercial-speech *prohibitions* are traditionally subject to intermediate scrutiny. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010).

New York's surcharge prohibition is just that—a prohibition. It tells merchants what they *may not* say ("[N]o seller ... may ..."), not what they *must* say. *See* N.Y. CA2 Br. 35 ("The only thing that plaintiffs cannot say is that their prices include a credit-card surcharge."); *Fulvio*, 517 N.Y.S.2d at 1015 ("[W]hat GBL § 518 *prohibits* is a price differential [if] characterized as an additional charge for payment by use of credit card."); JA 118 ("The law prevents [merchants] from saying that there is a 2% or 3% surcharge on heating oil, even if they disclose the surcharge prominently."). When the Attorney General's office tells merchants what to say, it advises them to use the state's preferred "discount" framing, not to disclose the total credit-card price in dollars and cents. JA 107-08, 115, 119, 125. And, from the start, supporters and defenders of the surcharge ban understood that it was the *opposite* of a disclosure rule, while its opponents (the Fed, the FTC, and consumer groups) advocated *replacing* it with a disclosure rule. Pet. Br. 11-14.

The hallmark of disclosure requirements is clarity. They mandate precisely what must be disclosed and how—often down to layout and font size. (Food manufacturers need not guess about what goes on the Nutrition Facts panel; mortgage lenders are not left in the dark about how to disclose interest rates.) As this Court explained in *Zauderer*, imposing serious penalties based on a disclosure law that fails to "specify precisely what disclosures [are] required" "would raise significant due process concerns." 471 U.S. at 653 n.15. To comply with

the Due Process Clause and the First Amendment, a state must "articulate its disclosure rules" to give a "sure guide" to those tasked with following those rules. *Id.*

IV. New York's law is unconstitutionally vague.

Whatever else may be said about it, New York's no-surcharge law has not offered merchants a "sure guide." *Id.* "[I]nsofar as the vagueness doctrine is concerned," the law's validity "depend[s] as much on [its] enforcement history as [its] literal terms." *Smith v. Goguen*, 415 U.S. 566, 582 n.31 (1974). Yet, disregarding this history, the state dismisses our vagueness challenge as resting on mere "hypotheticals," and assures the Court that the statute's text gives merchants "more than enough" notice of its "obvious" reach. Resp. Br. 56-57.

The statute's nebulous reach is neither "obvious" nor of "hypothetical" concern to the petitioners, who face practical questions that the state refuses to answer. One petitioner, Expressions, engages in dual pricing but is "very concerned about how [it is] supposed to ensure [] compliance." JA 62. The other four forgo dual pricing, even though they would prefer it, because of the "real-world difficulty" of ensuring that the price difference would be lawfully communicated. JA 48; *see* JA 43-44, 52-53, 58. These practical problems are unavoidable: Customers will ask questions, and petitioners need to know how to respond. Though Expressions takes pains to frame the price difference as a discount, what if a customer calls asking for its prices—just as the Attorney General's office called scores of small merchants in recent years? JA 62. What is Expressions supposed to say?

Rather than answer, the state only compounds these difficulties. Even though a state prosecutor and a state judge agreed that the law prohibits telling customers that "it would cost more for a credit card purchase," *Fulvio*, 517 N.Y.S.2d at 1010, and a criminal conviction

was secured on that basis, the state now assures this Court that "a seller is free to tell its customers that a credit card user ultimately pays more than a cash user." Resp. Br. 38-39. But the very fact that New York now claims to read the law more restrictively than it has been enforced—to cover labeling, signs, and advertising, but apparently not conversations—underscores its vagueness. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132-33 (1992) (statute's "implementation" and "practice" revealed lack of clear standards). The text does not explain this difference, and merchants cannot be expected to read the Attorney General's brief in this case to learn what the law means.[1]

The state's "assurance it will elect not" to take the very positions it has taken in the past "is insufficient to remedy the constitutional violation." *F.C.C. v. Fox*, 132 S. Ct. 2307, 2318 (2012). "Just as in the First Amendment context, the due process protection against vague regulations does not leave regulated parties at the mercy of *noblesse oblige*." *Id.* (alteration omitted). The law's entire enforcement history—from *Fulvio* to recent sweeps—"is itself evidence of the danger in putting faith in government representations of prosecutorial restraint." *Stevens*, 559 U.S. at 480.

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[1] "This Court's case law makes clear that [the Court is] not to give the Attorney General's interpretative views controlling weight." *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000). His view "does not bind the state courts or local law enforcement authorities," *Va. v. Am. Booksellers Ass'n*, 484 U.S. 383, 395 (1988), and he may change his mind or be replaced in office.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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EXPRESSIONS HAIR DESIGN, ET AL., PETITIONERS

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTION PRESENTED

Whether New York's regulation of the conditions under which sellers may differentiate between prices charged to customers paying by credit card and customers paying by other means, N.Y. Gen. Bus. Law § 518, is subject to scrutiny under, and consistent with, the First Amendment.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

INTEREST OF THE UNITED STATES

This case concerns the application of the First Amendment to a state statute that regulates merchants who charge higher prices to customers paying by credit card than to customers paying by cash. That state statute was enacted following the expiration of a temporary federal law that addressed the same subject, and it replicates portions of the federal statute's language. See Pet. App. 5a-8a. In addition, the analysis that the Court adopts in this case may have significant ramifications for current federal regulation of pricing and related activities. The United States therefore has a substantial interest in the Court's disposition of this case.

STATEMENT

1. In order for a merchant to accept payment by credit card, it must pay the credit-card issuer (and, potentially, an intermediary bank) a fee on each credit-card transaction. Pet. App. 3a; see U.S. Gov't Accountability Office, GAO-10-45, *Credit Cards* 6-9 (Nov. 2009). The total fee is typically about one to three percent of the purchase price, although the precise amount varies depending upon, *inter alia*, the specific card that a customer uses. *Credit Cards* 9-11, 17.

Some merchants seek to recoup the fee or to discourage the use of credit cards by charging a higher price when a customer pays by credit card than when the customer pays by cash (or by check, debit card, or other equivalent means). Pet. App. 3a. Because merchants may incur different fees when accepting different cards, a fixed additional charge for credit-card customers may, in the context of a particular credit-card transaction, be higher or lower than the fee that the merchant must pay.

2. Since its enactment in 1968, the Truth in Lending Act (TILA), Pub. L. No. 90-321, Tit. I, 82 Stat. 146, has regulated the manner in which merchants are required to inform consumers of additional charges for credit-card purchases.

a. TILA originally defined the "finance charge" for a credit transaction to include "any differential between the price for cash transactions and the price for credit transactions." S. Rep. No. 23, 97th Cong., 1st Sess. 1 (1981) (1981 Senate Report) (quoting TILA § 106(a)(1), 82 Stat. 148). By defining the "finance charge" in that manner, the statute required that those differentials be "disclosed to credit customers." *Ibid.*

In practice, however, including such differentials in the finance charge "effectively precluded" merchants from "operating under two-tier pricing systems" that distinguished between cash and credit-card purchases. 1981 Senate Report 1. Adopting such a differential scheme would have resulted in a finance charge being "imposed by the seller at the point of sale," potentially triggering violations of both TILA (if the finance charge were not disclosed) and state usury laws. *Ibid.*

b. In 1974, Congress amended TILA to exclude from the definition of "finance charge" certain "discount[s]" of up to five percent offered by a merchant to "induc[e] payment by cash, check, or other means not involving the use of a credit card." Fair Credit Billing Act (FCBA), Pub. L. No. 93-495, Tit. III, § 306, 88 Stat. 1515. The exclusion applied only if the discount was "offered to all prospective buyers and its availability [was] disclosed to all prospective buyers clearly and conspicuously" pursuant to implementing regulations promulgated by the Federal Reserve. *Ibid.* The amended version of TILA also foreclosed credit-card issuers from contractually prohibiting merchants from offering discounts for cash purchases. *Ibid.*

The amended law's reference to "discounts," rather than to price differentials more generally, sparked debate about whether to distinguish, for regulatory purposes, among three types of pricing systems: (1) an express "discount" system in which "a percentage of the tagged price is deducted to arrive at the cash price"; (2) a "surcharge system * * * in which the tagged price is the cash price and a premium or surcharge is added to the tagged price if the customer chooses to use a credit card"; and (3) a "two-tag sys-

tem * * * in which all merchandise is tagged with two prices, one for cash and one for credit." *FCBA Two-Tier Pricing and Procedures for Federal Reserve Board Regulation Writing: Hearing Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing & Urban Affairs*, 94th Cong., 1st Sess. 2-3 (1975) (*1975 Senate Hearing*) (statement of Federal Reserve Board member); see 1981 Senate Report 2. The Federal Reserve asked Congress to resolve that debate. See 1981 Senate Report 2.

During congressional hearings, one of several points emphasized by advocates of treating surcharge systems differently from other pricing systems was the importance of preventing consumer confusion or surprise when a decision to pay by credit card results in a higher price. A Federal Reserve Board member, echoed by representatives of both a consumer-advocacy group and a credit-card issuer, expressed concern that "different types of pricing systems from one store to the next may tend to confuse consumers and frustrate comparison shopping." *1975 Senate Hearing* 8; see *id.* at 4 (similar); *id.* at 124 (statement of Consumer Federation of America representative); *id.* at 178-179 (statement of American Express representative). "Since one store might discount while another surcharges," he explained, "a simple comparison of tagged prices would not indicate which price is cheaper. The customer would have to perform a mathematical computation to compare the prices, and consumers could find this burdensome and confusing." *Id.* at 8.

The legislative director for the Consumer Federation of America similarly took the view that "[c]onsumers should not have to endure the confusion which

would result from a wide variety of methods of advertising the price of an item," and that "[m]erchants should not be allowed to benefit from the increased volume generated by the posting of a credit card symbol on the window, only to then discourage use of the credit card by imposition of a surcharge." *1975 Senate Hearing* 123-124; see *The Fair Credit Billing Act Amendments of 1975: Hearing Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency & Housing*, 94th Cong., 1st Sess. 8, 13-14 (1975) (*1975 House Hearing*) (same). Banking organizations informed Congress that, in the case of surcharges, "a posting of a sign at entrances may not be sufficient * * * to prevent something akin to the troublesome 'bait and switch' technique." *1975 Senate Hearing* 85-86; see *id.* at 170 (similar from American Express representative); see also *1975 House Hearing* 90 (same). Those organizations explained that "[a] fundamental difference between a discount policy and a surcharge policy, which aggravates the disclosure problem, is that advertising containing a product price under a discount scheme will at worst" cause a consumer who "arrives at a store" to learn "that the cash price is *lower* than was advertised. The contrary is true if a surcharge is applied." *1975 Senate Hearing* 86.

c. In 1976, Congress amended TILA to distinguish between discounts and surcharges. Act of Feb. 27, 1976 (1976 Act), Pub. L. No. 94-222, § 3, 90 Stat. 197. The amendment defined "discount" as "a reduction made from the regular price" and defined "surcharge" as "any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means." § 3(a), 90 Stat.

197 (15 U.S.C. 1602(p) and (q) (1982)); see 15 U.S.C. 1602(p) (1982) ("The term 'discount' * * * shall not mean a surcharge."). Under the amended TILA, the two types of differential-pricing schemes were subject to different regulatory treatment.

The amendment supplemented the preexisting exclusion of certain clearly-disclosed discounts from the definition of "finance charge" by providing that such discounts would also be exempted from state-specific usury and disclosure laws. 1976 Act § 3(d), 90 Stat 198 (15 U.S.C. 1666j(c)). The amendment also contained a temporary rule, set to expire in three years, that prohibited merchants from "impos[ing] a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means." § 3(c)(1), 90 Stat. 197 (15 U.S.C. 1666f(a)(2) (1982)).

That temporary surcharge rule was later extended for an additional two years. 1981 Senate Report 2. Before that extension expired, Congress held a hearing on a proposal to again extend the rule. See *Cash Discount Act: Hearing Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing & Urban Affairs*, 97th Cong., 1st Sess. (1981). A Federal Reserve Board member testified at the hearing that the "economic distinction" between discounts and surcharges was "at best, uncertain," *id.* at 9, and urged Congress to replace the existing rule with a uniform disclosure requirement applicable to both discounts and surcharges, *id.* at 10. Representatives of consumer groups likewise opposed extending the surcharge rule, although representatives of the credit-card industry favored it. Compare, *e.g.*, *id.* at 92 (statement of Consumer Federation of America representative), with *id.* at 43 (statement of American

Express representative). The sponsor of the extension bill expressed the view that the surcharge rule "ha[d] served consumers well by preventing bait and switch type tactics." *Id.* at 1-2 (statement of Sen. Chafee).

d. In 1981, Congress updated, but did not substantially alter, TILA's preexisting framework for discounts and surcharges. See Cash Discount Act (CDA), Pub. L. No. 97-25, 95 Stat. 144. The 1981 amendment extended the surcharge rule for another three years, § 201, 95 Stat. 144; removed the five-percent ceiling on cash discounts that could be excluded from the finance charge, § 101, 95 Stat. 144 (15 U.S.C. 1666f(b)); and limited the Federal Reserve's role in defining the sorts of "clear[] and conspicuous[]" disclosures required for such discounts, *ibid.*; see § 103, 95 Stat. 144.

The amendment also "further clarified" the distinction between discounts and surcharges by enacting a statutory definition (drawn largely from a preexisting regulatory definition) of the "regular price" that would be used as the baseline for classifying a particular pricing scheme into one category or the other. Pet. App. 6a; see 1981 Senate Report 3-4; see also 12 C.F.R. 226.2(tt) (1981). The new statutory definition specified that, if only "a single price [were] tagged or posted" by a merchant, that single price would be the regular price. CDA § 102(a), 95 Stat. 144 (15 U.S.C. 1602(x) (1982)). If "no price [were] tagged or posted," however, or if "two prices [were] tagged or posted, one of which is charged when payment is made by * * * credit card and the other when payment is made by use of cash, check, or similar means," the

regular price would be "the price charged * * * when payment is made by * * * credit card." *Ibid.*

Because TILA continued to define a "surcharge" as "increasing the regular price" when a customer used a credit card, 15 U.S.C. 1602(q) (1982), the new definition made clear that a scheme in which a merchant charged more to credit-card customers would be considered a surcharge (and thus impermissible) only when the merchant displayed the lower cash price in dollars and cents without doing the same for the higher credit-card price. See Pet. App. 15a ("The federal surcharge ban * * * could never be violated unless the seller 'tagged or posted' a single price."). If the merchant listed both prices in dollars-and-cents form, TILA would define the credit-card price as the "regular price," so no increase above the "regular price" would occur and the pricing differential would be considered a permissible discount. The statute likewise permitted a merchant to list *only* the credit-card price, while charging cash customers a lower amount, without violating the surcharge prohibition. In that circumstance as well, the credit-card price would *be* the "regular price" as that term was defined in the statute, and no increase over the regular price would occur.

The Senate Report accompanying the 1981 legislation explained that the temporary surcharge rule was "intend[ed] to assure that consumers will be seeing at least the highest possible price they will have to pay when they see a tagged or posted price." 1981 Senate Report 4. The statute "permit[ted] merchants to have two-tier pricing systems," "to offer a differential between the credit price and the cash price," and "to choose the manner and method by which they will tag

or post these prices," so long as "when prices are tagged or posted, the consumers will be exposed to the highest price." *Ibid.* The purpose of that approach was to ensure that merchants "cannot implement two-tier pricing systems which deceive or mislead the consumer." *Ibid.* "In other words, consumers cannot be lured into an establishment on the basis of the 'low, rock-bottom price' only to find at the cash register that the price will be higher if a credit card is used." *Ibid.*

e. In 1984, TILA's temporary surcharge rule expired, and Congress has not renewed it. Pet. App. 7a. Other provisions concerning higher prices for credit-card customers—prohibiting credit-card issuers from contractually barring cash discounts, 15 U.S.C. 1666f(a); excepting certain clearly and conspicuously disclosed discounts from the definition of a "finance charge" and from state laws, 15 U.S.C. 1666f(b), 1666j(c); and defining relevant terms, see 15 U.S.C. 1602(q), (r), and (y)—remain in the statute. Under current TILA regulations, however, the disclosure requirements applicable when merchants impose credit-card surcharges at the point of sale are no more exacting than the disclosure requirements that apply when merchants provide cash discounts. See 15 U.S.C. 1666f(b) (requiring "clear[] and conspicuous[]" disclosure of discounts); 12 C.F.R. 1026.5(a)(1)(A), 1026.9(d)(1) (requiring only prior oral disclosure when someone other than card issuer imposes a finance charge, such as a credit-card surcharge, at the point of sale).

3. a. Following the expiration of the federal surcharge rule, various States, including New York, enacted their own surcharge laws. Pet. App. 7a. New

York's law, N.Y. Gen. Bus. Law § 518 (McKinney 2012), makes it a misdemeanor criminal offense for a seller to "impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." Although Section 518's "operative language is essentially identical" to the expired federal surcharge rule, the state law "does not incorporate its federal counterpart's explicit definitions of 'surcharge,' 'discount,' and 'regular price.'" Pet. App. 7a-8a.

b. Petitioners are New York-based businesses, owners, and managers who allege that they "would like to impose a credit-card surcharge, as opposed to offering a cash discount," on prices they charge to their customers. Pet. App. 11a. They claim that they are chilled from doing so by Section 518, and that the state law both violates the First Amendment and is unconstitutionally vague. *Id.* at 10a-11a.

Two petitioners have indicated that they want to display only the price for cash customers, and not the price for credit-card customers, in dollars-and-cents form, accompanied by a proviso stating that a "surcharge" (of, say, three percent) applies to customers who pay by credit card. Pet. App. 11a. One of those petitioners also alleges that, although it currently displays both cash and credit-card prices in dollars-and-cents form, it "fears that it will be prosecuted under Section 518 simply for characterizing that price difference as a 'surcharge' or an 'extra' charge for paying with a credit card." *Id.* at 29a (citation and internal quotation marks omitted).

c. Petitioners brought suit in federal district court against respondent state and local officials. The district court ultimately granted permanent injunctive

relief precluding respondents from enforcing Section 518 against petitioners. Pet. App. 48a-85a.

Based on Section 518's "plain text," Pet. App. 69a, its omission of analogues to TILA's definitions of "the terms 'surcharge,' 'discount,' and 'regular price,'" *id.* at 71a, and a history of "enforcement actions under section 518 * * * inconsistent with [those] federal definitions," *ibid.*, the district court construed the challenged state law to be substantially broader than the expired federal surcharge rule. *Id.* at 68a-72a. In the court's view, even a merchant who displays cash and credit-card prices with "equal prominence" could "legitimately fear prosecution" under Section 518 for describing the difference between the two prices as a "surcharge." *Id.* at 70a. The court also stated that, even under a narrowing construction of Section 518 proffered by respondents, Section 518 would function as "an *anti*-disclosure statute" that would "bar a seller from disclosing its cash price even marginally more conspicuously than its credit-card price." *Id.* at 75a.

The district court concluded that Section 518 "clearly regulates speech, * * * and does so by banning disfavored expression." Pet. App. 73a. It declined to analyze the law's constitutionality using the "lenient standard of review" applicable to consumer-disclosure laws under *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Pet. App. 75a. The court instead treated the law as a prohibition of commercial speech and found it unconstitutional under the test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Pet. App. 75a-79a. The district court also concluded that, "to the extent liability under section 518 turns on the labels that sellers use to describe

their prices, the statute is impermissibly vague." *Id.* at 80a.

d. Respondents appealed, but did not renew their contention that Section 518 is valid under *Zauderer* as a reasonable consumer-disclosure law. See Pet. App. 18a & n.7; Resp. C.A. Br. 24-54; Resp. C.A. Reply Br. 3-25. The court of appeals vacated and remanded with instructions to dismiss petitioners' claims. Pet. App. 1a-47a.

The court of appeals concluded that Section 518, as applied to prohibit a seller from posting a single sticker price accompanied by a proviso about an additional percentage surcharge for using a credit card, does not violate the First Amendment. Pet. App. 18a-28a; see *id.* at 14a-15a. The court understood Section 518, in that context, to "regulate[] conduct"—namely, "a pricing practice"—"not speech." *Id.* at 27a. The court proceeded "from the premise—conceded by [petitioners]—that prices, although necessarily communicated through language, do not rank as 'speech' within the meaning of the First Amendment." *Id.* at 19a. The court reasoned that, as applied to the display of a single price, "[w]hat Section 518 regulates—all that it regulates—is the difference between a seller's sticker price and the ultimate price that it charges to credit-card customers." *Id.* at 21a-22a. The court additionally held that Section 518 is not unconstitutionally vague in that context. *Id.* at 42a-45a.

The court of appeals abstained, under *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941), from deciding whether Section 518 is constitutional as applied to merchants who post separate cash and credit-card prices, or who do not post a price at all. Pet. App. 28a-40a, 45a. The court viewed abstention as

appropriate in light of the court's uncertainty about whether Section 518 "has any applications outside the single-sticker-price context." *Id.* at 36a. The court recognized that TILA's expired surcharge rule had no such applications, *id.* at 31a, but found a "dearth of authority" in the state courts about whether "Section 518 has a broader reach than the federal statute did," *id.* at 32a. The court refused to decide the case based on "speculation that the New York courts might give [Section 518] an expansive and arguably problematic reading." *Id.* at 36a. At the same time, however, the court "decline[d] to speculate" that the state courts would necessarily adopt a narrower construction. *Id.* at 37a. It noted, in particular, that although respondents had "invite[d]" it "to construe Section 518 as being identical to its lapsed federal counterpart if necessary to avoid constitutional difficulties, [respondents] never quite abandon[ed] the position that Section 518 might apply in the absence of a single sticker price." *Id.* at 37a n.13.

SUMMARY OF ARGUMENT

The court of appeals did not correctly analyze petitioners' challenge to N.Y. Gen. Bus. Law § 518. As applied here, Section 518 is properly viewed as a regulation of speech. That state statute may be constitutional, however, either as a permissible consumer-disclosure law (like the former federal surcharge rule), or on some alternative ground. The Court should remand the case for the court of appeals to undertake the appropriate analysis in the first instance.

I. This Court has consistently distinguished economic regulation, which is not subject to First Amendment scrutiny even when it has an indirect effect on

speech, from regulation of speech, which is subject to varying degrees of First Amendment scrutiny depending on the context. Examples of economic regulation include a law that limits a seller's ability to set the price of a good or service, a law that specifies the content or quality of the good or service that the seller provides, or a law that treats a seller's contractual offers as having legally binding effect. Section 518's application here, in contrast, is a regulation of speech, because it addresses the manner in which a merchant may present its pricing scheme to the public.

II. The fact that Section 518 regulates speech does not mean that it is unconstitutional. This Court has reviewed laws directed at commercial speech, such as the advertisement of prices, in a manner that respects the government's broad prerogatives in regulating commerce. In particular, a law requiring only that commercial actors make specified truthful disclosures is constitutional if the "disclosure requirements are reasonably related to the [government's] interest in preventing deception of consumers." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

Under that standard, TILA's expired surcharge rule, 15 U.S.C. 1666f(a)(2) (1982), which required merchants who displayed a cash price to display any higher credit-card price as well, was a valid consumer-disclosure law. Congress could reasonably seek to prevent consumers from being misled by the display of a single unqualified cash price by requiring merchants to disclose their higher credit-card price up front, in dollars-and-cents form. That requirement ensured that customers would receive pricing information in a consistent and easily digestible form,

while allowing merchants to characterize the higher prices as including a "surcharge" or to attempt in other ways to influence customer behavior regarding the use of credit cards.

III. Although the prior TILA surcharge rule was a valid consumer-disclosure requirement, and Section 518 was modeled after that federal provision, respondents did not ask the court of appeals to analyze Section 518 as a consumer-disclosure law. In addition, unresolved questions exist concerning the scope of Section 518's coverage, and resolution of those issues may affect the determination whether Section 518 is constitutional in all of its applications. Consideration of those issues, as well as any additional statutory or constitutional analysis necessary to adjudicate petitioners' claims, would be best conducted by the court of appeals on remand.

ARGUMENT

New York's ban on credit-card surcharges, N.Y. Gen. Bus. Law § 518, prohibits a merchant who posts a single price for an item from charging more than the posted price to a customer who elects to pay by credit card rather than cash. See Pet. App. 14a-15a. Because petitioners' potential liability under Section 518 turns solely on how they would present a lawful pricing differential to consumers, the statute is properly analyzed as a regulation of speech. But to the extent that Section 518 (like the federal surcharge rule that preceded it) simply requires up-front disclosure in dollars and cents of higher prices charged to credit-card customers, it would impose a reasonable and therefore constitutional consumer-disclosure requirement under *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 650-653 (1985). It is unclear, howev-

er, whether the scope of the state law is so limited, and a consumer-disclosure rationale was neither pressed nor passed upon in the court of appeals. This Court should accordingly vacate the judgment below and remand for further proceedings.

I. SECTION 518 REGULATES PETITIONERS' SPEECH

A. Regulation Of Economic Conduct Is Not Regulation Of Speech

Economic regulation of commercial transactions, including regulation of the prices that sellers may charge, is not in itself regulation of speech. "[I]t has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeeper, &c., and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold." *Munn* v. *Illinois*, 94 U.S. 113, 125 (1877). Consistent with the long history of such laws coexisting with the First Amendment, this Court has viewed them as "non-speech-related" forms of regulation that do not raise any First Amendment concerns. *Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357, 372 (2002) (describing limits on drug sales as a constitutionally unproblematic alternative to unconstitutional restrictions on drug advertising); see *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (viewing "direct regulation" to compel "higher prices," or to limit purchases, as "not involv[ing] any restriction on speech"); *id.* at 524 (Thomas, J., concurring in part and concurring in the judgment) (viewing "directly banning a product, * * * controlling its price, or otherwise restricting its sale in specific ways" as "involving no restriction on

speech regarding lawful activity"); *id.* at 530 (O'Connor, J., concurring in the judgment) (viewing restrictions on prices and sales to be consistent with the First Amendment).

B. Laws Regulating Commercial Transactions Are Subject To First Amendment Scrutiny Only When They Have A Non-Incidental Effect On Protected Speech

Even when the regulation of a commercial transaction affects speech, it does not necessarily lose its economic character. As many of this Court's decisions illustrate, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552, 567 (2011).

For example, the Court has found it "beyond dispute" that the application to newspaper publishing of "generally applicable economic regulations," such as antitrust or labor laws, does not "creat[e] constitutional problems." *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 581 (1983). More generally, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (citation omitted). It is accordingly "well established that the Government may restrict speech without affronting the First Amendment" when "false claims are made to effect a fraud." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2547 (2012) (plurality opinion) (citing *Virginia State Bd. of Pharm.* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)).

In other contexts as well, the government may attach legal consequences to speech without triggering First Amendment concerns. Enforcement of contracts, for example, is unproblematic even though liability for any breach depends in part on what the breaching actor has previously promised to do. See, *e.g.*, Fredrick Schauer, *Categories and the First Amendment*, 34 Vand. L. Rev. 265, 270 (1981) (observing that, while parties "make contracts with speech," the First Amendment does not protect the right to "breach contracts"). And even when the common-law prerequisites to contract formation have not been satisfied, the government has broad latitude to require commercial actors to honor representations they have made to the public. A law that simply requires a merchant to honor particular representations *if he chooses to make them* is properly viewed as regulating economic conduct rather than speech.

When a commercial regulation "does not simply have an effect on speech," but is instead aimed more directly at protected speech, it warrants First Amendment scrutiny. *IMS Health*, 564 U.S. at 567; see, *e.g.*, *Wisconsin* v. *Mitchell*, 508 U.S. 476, 487 (1993) (distinguishing between a law "aimed at conduct unprotected by the First Amendment" and a law "explicitly directed at expression"). But even when a challenged law is of the latter sort, the type and stringency of First Amendment review turns in part on "the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 562 (1980) (citation and internal quotation marks omitted); see,

e.g., *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 622-624 (1995); see also, *e.g.*, *Zauderer*, 471 U.S. at 651.

C. Because Section 518 Addresses The Manner In Which Merchants Must Describe Their Prices, That Provision Regulates Petitioners' Speech

In its application to the pricing schemes that petitioners desire to implement, Section 518 is not an economic regulation, but is instead a regulation of speech. It prescribes not the commercial practices a merchant must follow, but the way in which the merchant may communicate those practices to the public.

Although Section 518 might nominally be described as a prohibition on the conduct of "char[ging] an additional amount above the sticker price to * * * credit-card customers," Pet. App. 21a, its application to petitioners turns on the manner in which the "sticker price" conveys the merchant's pricing scheme. Under Section 518, a merchant is free to charge cash customers $100 and credit-card customers $103 for the same item. See *id.* at 14a. If the price tag displays a single dollars-and-cents price of $103, or (potentially) if both prices are displayed with equal prominence, the merchant is deemed to be granting a cash discount, which Section 518 permits. See *id.* at 14a-15a. But if the price tag displays a single dollars-and-cents price of $100, the merchant is deemed to be imposing a credit-card surcharge, which Section 518 forbids. See *ibid.* Because Section 518 addresses the *communication* of an otherwise-permissible pricing scheme, rather than the pricing scheme *itself*, it is properly considered a regulation of speech.

Contrary to the court of appeals' conclusion (Pet. App. 27a), Section 518's application here thus "differs

in a constitutionally significant way" from laws directed at commercial transactions. Section 518 does not "regulate prices," *ibid.*, in the same manner as a law that prohibits a merchant from charging different prices to cash customers and credit-card customers, or that limits the permissible amount of any such difference. See, *e.g.*, *National Ass'n of Tobacco Outlets, Inc.* v. *City of Providence*, 731 F.3d 71, 74, 76-78 & n.1 (1st Cir. 2013) (upholding, as economic regulation, prohibition on charging lower prices to customers with coupons or customers making higher-volume purchases) (cited at Pet. App. 24a, 26a). It also does not regulate the good or service being sold, as would a law requiring that a particular product be sold with a warranty. See, *e.g.*, 38 U.S.C. 3705(a) (requiring warranties for sale of certain homes to veterans). And it does not attach legal consequences to petitioners' commercial communications in a manner that might be analogized to contract law, as would a law that temporarily prohibited a merchant from altering previously offered prices. See, *e.g.*, N.Y. Gen. Bus. Law § 396-r(3)(b)(ii) (McKinney 2012) (anti-price-gouging law) (cited at Pet. App. 27a n.10); cf. 42 U.S.C. 1981 (prohibiting contract-related discrimination).

II. A LAW REQUIRING ONLY THAT SELLERS DISPLAY CREDIT-CARD PRICES ALONGSIDE CASH PRICES WOULD BE A VALID CONSUMER-DISCLOSURE REGULATION

As framed in the petition for a writ of certiorari, the question presented in this case assumes that Section 518 *either* "regulate[s] economic conduct" *or* "unconstitutionally restrict[s] speech." Pet. i. That is a false dichotomy. This Court has declined to interpret the First Amendment to "foreclose restrictions

on potentially or demonstrably misleading advertising," *In re R.M.J.*, 455 U.S. 191, 202 (1982), and has applied a form of reasonableness review to uphold disclosure requirements aimed at preventing consumers from misapprehending the terms of a commercial transaction, see *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 248-253 (2010); *Zauderer*, 471 U.S. at 650-653. A law of that sort may be directed at speech in a way that subjects it to First Amendment scrutiny, yet nevertheless survive First Amendment review. The expired federal surcharge rule, 15 U.S.C. 1666f(a)(2) (1982), which "assure[d] that consumers w[ould] be seeing at least the highest possible price they w[ould] have to pay when they s[aw] a tagged or posted price," 1981 Senate Report 4, and on which Section 518 was at least partially modeled, see Pet. App. 7a-8a, was constitutional under that standard.

A. A Consumer-Disclosure Requirement Is Valid Under The First Amendment If It Is Reasonably Related To Preventing Consumers From Being Misled

This Court has described "advertising the price of a product" as "typical commercial speech." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576 (1988). The degree of scrutiny that applies to regulation of such speech "turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson*, 447 U.S. at 563. In particular, the Court has distinguished between "restrictions on nonmisleading commercial speech regarding lawful activity," which "must withstand intermediate scrutiny," and "disclosure requirement[s]" aimed at preventing the public from being misled, which are sub-

ject to "less exacting scrutiny." *Milavetz*, 559 U.S. at 249; cf., *e.g.*, *American Meat Inst.* v. *United States Dep't of Agric.*, 760 F.3d 18, 21-27 (D.C. Cir. 2014) (en banc) (discussing reasons for applying lesser scrutiny to consumer-disclosure laws serving other governmental interests).

In *Zauderer*, this Court applied that distinction to reject a First Amendment challenge to a requirement that an attorney's advertisement disclose certain costs that clients might incur. See 471 U.S. at 650-653. The Court emphasized the "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. The Court recognized that disclosure requirements do "not attempt[] to prevent [advertisers] from conveying information to the public," but "only require[] them to provide somewhat more information than they might otherwise be inclined to present." *Ibid.* The Court explained that such requirements "trench much more narrowly on an advertiser's interests than do flat prohibitions on speech," because an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.* at 651.

The *Zauderer* Court reiterated the principle, which it had "emphasized" in "virtually all" of its prior "commercial speech decisions," that "'warnings or disclaimers might be appropriately required'" for particular commercial speech "'in order to dissipate the possibility of consumer confusion or deception.'" *Zauderer*, 471 U.S. at 651 (quoting *In re R.M.J.*, 455 U.S. at 201) (brackets omitted). While acknowledging advertisers' interest in avoiding "unjustified or unduly burdensome disclosure requirements," which might "chill[] protected commercial speech," the Court held

that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the [government's] interest in preventing deception of consumers." *Ibid.* Applying that standard to the case before it, the Court described as "deceptive" an advertisement that, although technically accurate, "'had a tendency to mislead.'" *Id.* at 653 (citation and internal quotation marks omitted); see *id.* at 652.

The Court reaffirmed and expanded upon *Zauderer*'s approach in *Milavetz*, *supra*, which upheld statutory requirements for particular disclosures in a law firm's advertisements for certain services. 559 U.S. at 248-253; see *id.* at 233-234. The government in *Milavetz* had "adduced no evidence" that the particular advertisements at issue in the case were misleading. *Id.* at 251. Based on legislative materials showing an overall "pattern of advertisements" that omitted the relevant information, however, the Court found that "the likelihood of deception in these cases 'is hardly a speculative one.'" *Ibid.* (quoting *Zauderer*, 471 U.S. at 652). The Court accordingly viewed the disclosure requirements as a reasonable measure "intended to combat the problem of inherently misleading commercial advertisements." *Id.* at 250.

B. The Expired Federal Surcharge Rule Was A Constitutional Consumer-Disclosure Law

Under the principles set forth in *Zauderer* and *Milavetz*, TILA's now-expired surcharge rule, 15 U.S.C. 1666f(a)(2) (1982), was constitutional. Although it was not explicitly labeled a consumer-disclosure law, the federal surcharge rule operated, and appears to have been intended to operate, to ensure that consumers were adequately informed about

merchants' pricing practices. See 1981 Senate Report 4; see also *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 652 (1994) (subjective motives of legislature irrelevant to constitutional analysis). In particular, the federal rule "permit[ted] merchants * * * to offer a differential between the credit price and the cash price," while "[p]reclud[ing] * * * the possibility that a merchant w[ould] tag or post only the lower price, and thereby charge the customer who pa[id] by credit card a higher price than disclosed." 1981 Senate Report 4.

1. The federal surcharge rule, like Section 518, prohibited "a surcharge on a cardholder who elects to use a credit card." 15 U.S.C. 1666f(a)(2) (1982). Unlike Section 518, however, that federal law contained express definitions of the relevant terms, which made clear that the federal surcharge rule functioned solely as a disclosure requirement.

Pursuant to those definitions, a merchant violated the federal surcharge rule if, but only if, it charged a higher price to credit-card customers, yet displayed only a lower cash price without also displaying the higher credit-card price. TILA defined a "surcharge" as "any means of increasing the regular price to a cardholder" for using a credit card. 15 U.S.C. 1602(q) (1982). Under that definition, no surcharge occurred when the price charged to a credit-card customer equaled the "regular price." *Ibid.* And TILA defined the "regular price" to *be* the credit-card price "if either (1) no price is tagged or posted, or (2) two prices are tagged or posted," one of which is the credit-card price and the other the cash price. 15 U.S.C. 1602(x) (1982). Thus, the only circumstance in which the regular price was *not* the credit-card price—and therefore

the only circumstance in which a "surcharge" could occur—was when the merchant charged different prices to cash and credit-card customers but posted only the lower cash price. See *ibid.*; Pet. App. 15a ("The federal surcharge ban * * * could never be violated unless the seller 'tagged or posted' a single price.").

The federal surcharge rule thus allowed merchants substantial latitude to "choose the manner and method by which they w[ould] tag or post [their] prices." 1981 Senate Report 4. The only constraint was that, "when prices [were] tagged or posted," consumers had to "be exposed to the highest price." *Ibid.*

2. The federal surcharge rule's disclosure requirement was "reasonably related to the [government's] interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. Like the provisions upheld in *Milavetz*, TILA's former surcharge rule "share[d] all the essential features of the rule at issue in *Zauderer*." *Milavetz*, 559 U.S. at 250.

First, as in *Zauderer*, the disclosure required by the former TILA rule "entail[ed] only an accurate statement." *Milavetz*, 559 U.S. at 250. The price a merchant charges to credit-card customers is "purely factual and uncontroversial information about the terms under which [its] services," or its goods, "will be available." *Zauderer*, 471 U.S. at 651.

Second, as in *Zauderer*, the "required disclosure[]" in the federal surcharge rule was "intended to combat the problem of inherently misleading commercial advertisements." *Milavetz*, 559 U.S. at 250. Congress reasonably determined that disclosing only the lower cash price, without notification of the higher credit-card price, could "deceive or mislead the consumer."

1981 Senate Report 4. Under such a scheme, a consumer could "be lured into an establishment on the basis of a 'low, rock-bottom price' only to find at the cash register that the price w[ould] be higher if a credit card [were] used." *Ibid.* Particularly given the testimony that Congress had previously received on the issue of consumer confusion and misperception, see pp. 4-5, *supra*, "the likelihood of" such "deception" was "'hardly * * * speculative.'" *Milavetz*, 559 U.S. at 251 (quoting *Zauderer*, 471 U.S. at 652).

Finally, as in *Zauderer*, the federal surcharge rule "d[id] not prevent" regulated persons "from conveying any additional information," *Milavetz*, 559 U.S. at 250, that they might wish to present. So long as a merchant disclosed its higher credit-card price, the surcharge rule permitted merchants to describe or discuss their pricing schemes in any manner they wished. Nothing in TILA prohibited a merchant from describing the higher credit-card price as including a "surcharge." TILA likewise allowed a merchant to explain that the added amount reflected the merchant's own obligation to remit a percentage of the purchase price to the credit-card issuer, to criticize the credit-card issuer for assessing such a fee, or to exhort customers to pay in cash and deny the credit-card issuer a share of the proceeds.

3. Like many disclosure laws, including the ones upheld in *Milavetz*, see 559 U.S. at 233-234, the federal surcharge rule prescribed a particular format for making the required disclosure. The interaction between the rule and the definition of "regular price" required that the credit-card price be "tagged or posted" as a "price"—*i.e.*, the specific amount, in dollars and cents, that the merchant would charge to a credit-

card customer. 15 U.S.C. 1602(x) (1982); see 15 U.S.C. 1666f(a)(2) (1982). That prescription did not affect the law's constitutionality.

The First Amendment did not require Congress to acquiesce in the desire of merchants who, like petitioners, might have preferred to display only the cash price as a price, and to communicate the additional charge for credit-card purchases solely as a mathematical formula—*e.g.*, a "3% credit-card surcharge," Pet. App. 11a (citation omitted). Nor was Congress required to allow the cash price to be displayed more "conspicuously," *id.* at 75a, than the credit-card price. The authority of the government to require "warnings or disclaimers * * * in order to dissipate the possibility of consumer confusion or deception," *Zauderer*, 471 U.S. at 651 (citation and brackets omitted), includes the power to make a reasonable judgment that one manner of conveying information is likely to be clearer than another.

Thus, in *Zauderer*, the State could require certain explicit disclosures in the context of an advertisement that was technically truthful, subject to the application of a reasonableness standard designed to ensure that the disclosure was not "unjustified or unduly burdensome." 471 U.S. at 651; see *id.* at 652; see *id.* at 653 n.15 (rejecting argument that disclosure requirement was unduly burdensome as applied). If that standard is satisfied, the government need not litigate the adequacy of every alternative form of words that some regulated party might prefer. See *Milavetz*, 559 U.S. at 251 (rejecting challenge to disclosure requirement that "amount[ed] to little more than a preference on [the challenger's] part" for a differently worded statement).

In enacting and revising the federal surcharge rule, Congress reasonably determined that disclosure of the credit-card price as a price, in circumstances where the merchant has already chosen to communicate the cash price as a price, was the best way to avoid consumer deception and confusion. Congress had been informed that "different types of pricing systems from one store to the next may tend to confuse consumers," and that "consumers could find" it "burdensome and confusing" to perform a "mathematical computation" in order to compare prices. *1975 Senate Hearing* 8 (statement of Federal Reserve Board member); see *id.* at 123 (consumer advocate urging that "[c]onsumers should not have to endure the confusion which would result from a wide variety of methods of advertising the price of an item"). A consumer might find it difficult or burdensome to determine the actual cost of an appliance advertised at $369 with a 3.5% credit-card surcharge, or to compare that cost to the cost of the same appliance advertised at $379 at the store across town. To facilitate informed purchasing decisions by consumers, Congress could reasonably require that higher credit-card prices be presented in a concrete and familiar form.

4. Congress could also permissibly focus on one specific type of potential consumer confusion—namely, confusion about additional charges for using a credit card—without simultaneously regulating other aspects of how merchants advertise their prices. This Court has rejected the "argument that a disclosure requirement is subject to attack if it is 'underinclusive'—that is, if it does not get at all facets of the problem it is designed to ameliorate." *Zauderer*, 471 U.S. at 652 n.14. "As a general matter, governments are entitled

to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied. The right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right." *Ibid.* (citation omitted).

The federal surcharge rule was therefore constitutional notwithstanding the absence of similar disclosure requirements for other types of charges, like sales tax, that would affect the total amount paid to purchase an item. Congress could also permissibly differentiate between "surcharge[s]" resulting in credit-card customers paying *more* than the posted price (which had to be disclosed by displaying the credit-card price, see 15 U.S.C. 1666f(a)(2) (1982)) and "discount[s]" resulting in cash customers paying *less* than the posted price (which could potentially be disclosed in other ways, so long as the disclosure was "clear[] and conspicuous[]," 15 U.S.C. 1666f(b) (1982)). Congress enacted the TILA surcharge rule after being informed that "the disclosure problem" is "aggravate[d]" in the former circumstance, which presents the possibility of "something akin to the troublesome 'bait and switch' technique," in which a customer is enticed by a misleadingly low price. *1975 Senate Hearing* 86 (statement of banking organizations). In the latter circumstance, by contrast, the customer will, "at worst," "arrive[] at a store" to find "that the cash price is *lower* than was advertised." *Ibid.*

The federal surcharge rule's targeted disclosure requirement was different from the "content-based restrictions on speech," like the differential regulation of signs with different messages that the Court recently invalidated in *Reed* v. *Town of Gilbert*, 135

S. Ct. 2218 (2015), that are subject to "strict scrutiny," *id.* at 2231; see *id.* at 2224. The Court's rejection of underinclusivity challenges to consumer-disclosure laws, see *Zauderer*, 471 U.S. at 652 n.14, accords with the broader principle that distinctions in the context of commercial speech are "neutral enough" to avoid strict scrutiny when they are premised on "one of the characteristics of commercial speech"—here, its potential to mislead—that "justifies depriving [commercial speech] of full First Amendment protection" in the first place, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992). Thus, "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there." *IMS Health*, 564 U.S. at 579 (quoting *R.A.V.*, 505 U.S. at 388-389); see *ibid.* (observing that the "principle" that "content-based restrictions on protected expression are sometimes permissible * * * applies to commercial speech"). And, as explained above, the former TILA rule also differed from typical "restrictions on speech" in that it did not forbid the communication of any information that a merchant wished to convey. Rather, it simply required the provision of *additional* information (the credit-card price, stated as a price) if the merchant engaged in differential pricing and chose to post the lower cash price.

5. As with any "warning[]," "disclaimer[]," or other type of disclosure that the government might reasonably require, *Zauderer*, 471 U.S. at 651 (citation omitted), the disclosure previously mandated by the federal surcharge rule could have affected a consumer's perception of a proposed commercial transaction and his willingness to engage in it. But because any such

effect would be the result of additional truthful information that Congress reasonably deemed necessary to prevent consumers from being confused or misled, the rule was consonant with the First Amendment.

The disclosure requirements in *Zauderer*, for example, were held to be constitutional even though many prospective clients would doubtless be warier of engaging an attorney's services if informed about additional potential costs. See 471 U.S. at 650-653. That approach recognizes that "protection for commercial speech is justified in large part by the information's value to consumers," *Milavetz*, 559 U.S. at 249, and reflects that "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information," *Ibanez* v. *Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994) (citation and internal quotation marks omitted).

The Court's approach also recognizes that consumer-disclosure laws leave ample room for a regulated entity to use its preferred terms to characterize a transaction. See *Milavetz*, 559 U.S. at 249. The *Zauderer* standard applies only to the extent that a law requires the effective disclosure of information. To the extent that a law limits a regulated entity's ability to provide "additional information" that is neither false or misleading, the law is subject to more exacting First Amendment scrutiny. *Id.* at 250. In this case, for example, petitioners wish to discourage credit-card purchases by describing higher credit-card prices as a penalty and taking advantage of a psychological propensity to attach higher priority to avoiding losses than to achieving gains. See Pet. Br. 6-8. Under the former TILA surcharge rule, they would have been

free to do so. Any law that prohibited the use of such terms would be analyzed under *Central Hudson* rather than under *Zauderer*, and it would require a justification separate from the government interests that underlay the federal surcharge rule. See, *e.g.*, *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 480-491 (1995) (applying *Central Hudson* to ban on displaying alcohol content on beer labels).

6. Petitioners err in suggesting (Br. 48-49) that the former federal law was unconstitutionally vague. The constitutional vagueness inquiry turns not on whether there is an abstract "economic distinction" between surcharges and discounts, Pet. Br. 48 (citation omitted), or on whether people might seek agency guidance in some circumstances, *id.* at 13 n.3, 48-49, but instead on whether the law itself "provide[s] a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 18 (2010) (*HLP*) (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008)). The language in the federal surcharge rule bore no resemblance to "the sorts of terms," involving "'wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings,'" that this Court "ha[s] previously declared to be vague." *Id.* at 20 (quoting *Williams*, 553 U.S. at 306).

As discussed above, the statutory definitions made clear that what was prohibited was to "tag or post[]" the cash "price" without similarly "tag[ging] or post[ing]" any higher credit-card "price." 15 U.S.C. 1602(x) (1982); see *HLP*, 561 U.S. at 21 (relying on statutory definitions in rejecting vagueness chal-

lenge). Even if there were some ambiguity on the margins as to what constituted "tag[ging]" or "post[ing]," see, *e.g.*, 43 Fed. Reg. 3899 (Jan. 30, 1978) (addressing "unique" situation of gas stations under Federal Reserve regulations), "perfect clarity and precise guidance have never been required even of regulations that *restrict* expressive activity," *Williams*, 553 U.S. at 304 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989)) (emphasis added), let alone consumer-disclosure laws.

III. THIS CASE SHOULD BE REMANDED FOR FURTHER CONSIDERATION OF THE SCOPE OF, AND JUSTIFICATIONS FOR, SECTION 518

Although New York's Section 518 was modeled on a prior federal law (the expired TILA surcharge rule) that was constitutional under the *Zauderer* framework, it does not necessarily follow that the less-specific state law is likewise valid. Respondents argued in the district court that Section 518 is a consumer-disclosure law subject to reasonableness review under *Zauderer*, but they did not renew that argument in the court of appeals. Compare, *e.g.*, 13-cv-03775 Docket entry No. 27, at 38-39 (S.D.N.Y. July 12, 2013) (motion to dismiss), with, *e.g.*, Resp. C.A. Br. 24-54. And *Zauderer*'s application to Section 518 depends on the resolution of an antecedent (and currently unresolved) issue of statutory construction—*i.e.*, whether Section 518 forbids the use of terms like "surcharge" or "penalty" to describe a merchant's pricing differential, even when both the credit-card price and the cash price are disclosed to consumers.

Respondents contend (Br. in Opp. 3) that "the [New York] Legislature made clear that [Section 518] should be construed identically to the prior federal

law." But Section 518 omits the relevant definitional provisions of TILA, and respondents appear to acknowledge that the state courts might construe it more broadly than its federal predecessor. See *id.* at 19-20; see also *People* v. *Fulvio*, 517 N.Y.S.2d 1008, 1015 (N.Y. Crim. Ct. 1987) (stating that a merchant "faces the prospect of criminal conviction" for "describ[ing] the higher price in terms which amount to the 'credit price' having been derived from adding a charge to the lower price") (emphasis omitted). The district court refused to interpret Section 518 to be congruent to the expired federal surcharge rule, concluding, *inter alia*, that such a construction "strays markedly from the ordinary plain meaning of [Section 518's] text." Pet. App. 80a; see *id.* at 68a-72a. The court of appeals declined to resolve that interpretive issue, and it accordingly abstained from deciding whether a state law that prohibited the use of terms like "surcharge" or "penalty" would violate the First Amendment. See *id.* at 28a-40a; see also *id.* at 37a n.13 (observing that respondents had "never quite abandon[ed] the position that Section 518 might apply in the absence of a single sticker price"). It also abstained from addressing petitioners' vagueness challenge. *Id.* at 45a.

This Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The Court would provide an appropriate level of guidance on the question presented in this case by clarifying that Section 518 regulates speech, but that a sufficiently specific law requiring only that a merchant display a credit-card price alongside a cash price would be a valid consumer-disclosure regulation. The Court could then remand for the court of appeals,

which is particularly well-situated to address (or certify) questions of state law, see, *e.g.*, *Butner* v. *United States*, 440 U.S. 48, 58 (1979), to determine the grounds on which respondents are defending Section 518 and to evaluate the statute's constitutionality in light of those defenses.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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NOVEMBER 2016

APPENDIX

1. N.Y. Gen. Bus. Law § 518 (McKinney 2012) provides:

Credit card surcharge prohibited

No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.

Any seller who violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or a term of imprisonment up to one year, or both.

2. 15 U.S.C. 1602 (1982) provided in pertinent part:

Definitions and rules of construction

* * * * *

(k) The term "credit card" means any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

* * * * *

(m) The term "cardholder" means any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person.

(n) The term "card issuer" means any person who issues a credit card, or the agent of such person with respect to such card.

* * * * *

(p) The term "discount" as used in section 1666f of this title means a reduction made from the regular price. The term "discount" as used in section 1666f of this title shall not mean a surcharge.

(q) The term "surcharge" as used in this section and section 1666f of this title means any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means."

* * * * *

(x) As used in this section and section 1666f of this title, the term "regular price" means the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of an open-end credit plan or a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of an open-end credit plan or a credit card and the other when payment is made by use of cash, check, or similar means. For purposes of this definition, payment by check, draft, or other negotiable instrument which may result in the debiting of an open-end credit plan or a credit cardholder's open-end account shall not be considered payment made by use of the plan or the account.

* * * * *

3. 15 U.S.C. 1666f (1982) provided:

Inducements to cardholders by sellers of cash discounts for payments by cash, check or similar means; credit card surcharge prohibition; finance charge for sales transactions involving cash discounts

(a) Cash discounts

(1) With respect to credit card which may be used for extensions of credit in sales transactions in which the seller is a person other than the card issuer, the card issuer may not, by contract, or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card.

(2) No seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means.

(b) Finance charge

With respect to any sales transaction, any discount from the regular price offered by the seller for the purpose of inducing payment by cash, checks, or other means not involving the use of an open-end credit plan or a credit card shall not constitute a finance charge as determined under section 1605 of this title if such discount is offered to all prospective buyers and its availability is disclosed clearly and conspicuously.

RECORD AND BRIEFS

No. 15-1391

Supreme Court, U.S.
FILED
DEC 21 2016
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In The
Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM, and DAVID ROSS,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; ERIC GONZALEZ, in his official capacity as Acting District Attorney of Kings County,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

Brief of Action on Smoking and Health, American Thoracic Society, National Association of County and City Health Officials, Public Good Law Center, and Tobacco Control Legal Consortium as *Amici Curiae* in Support of Respondents

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are public health and consumer protection organizations committed to the disclosure and dissemination of crucial information about food, medicine, tobacco, and other consumer products, as well as the prevention of deceptive labeling and advertising of those products.[1] Each of these organizations relies on robust mandatory disclosure and truth-in-advertising regimes in order to fulfill its mission. *Amici* consequently recognize the need both for First Amendment protection of commercial speech that conveys vital consumer information and for leeway to regulate commercial speech to ensure that the stream of information flows cleanly and repletely as well as freely.[2]

Pursuant to these principles, *amici* presented arguments adopted by the court in *National Association of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013), a decision relied on by the Second Circuit in this case. They seek by their participation here to assist the Court in resolving the case before it while preserving the vast array of regulatory measures that ensure the health, safety and well-being of the American people.

---

[1] This brief was not authored in whole or in part by counsel for a party and no one other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of the brief.

[2] Statements of interest of the individual *amici curiae* appear in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

The case before the Court is an unusual one. The parties agree on a great deal: that the act of pricing is economic conduct that does not implicate the First Amendment; that speech regulations aimed at preventing consumer deception do not generally offend the First Amendment; that any application of the First Amendment in this matter involves scrutiny no more stringent than the standard laid out in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). The parties differ principally in their interpretations of New York General Business Law Section 518 as it may be applied. The case is notable for the narrow scope of what the Court is being asked to decide.

The question for the Court's consideration effectively boils down to one of statutory rather than constitutional interpretation: to assess what it means to impose a surcharge under Section 518, and consequently to determine whether the statute is a form of economic regulation, a mandatory disclosure, or a restriction of commercial speech. The language of the statute – "No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card" – strongly suggests that there is nothing but conduct at issue here. To "impose a surcharge" is not to speak. Even accounting for the way that the statute has been applied and interpreted over time, the law is still best read as regulating conduct rather than speech. For the reasons set forth in Respondents' brief,

allowing discounts and dual pricing does not transform Section 518 into a regulation of speech. *See* N.Y. Resp. Br. at 22-39.

Should the Court determine, however, that regulation of speech is at issue, the assessment of that regulation under the First Amendment requires no pathbreaking development of constitutional doctrine. To the contrary: the most plausible interpretation of Section 518 may be dealt with straightforwardly under familiar, decades-old precedent.

Under this interpretation, what the statute prohibits is the sort of surprise surcharge familiar to drivers who have been lured into a gas station by a low posted price, only to find out that they will pay significantly more if they use a credit card. In other words, the "surcharge" which may not be imposed is any charge that makes the total cost to a consumer greater than the most prominently displayed or advertised price. Not only is this a "fairly possible" reading of the statute, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (1997), but it is also the most natural reading. A "surcharge" makes sense only in relation to a "regular price"; the only plausible way to understand "regular price" in this context is as the posted (or advertised) price.

Understood this way, the statute allows the communication that petitioners seek – the ability to make clear to consumers the costs of credit card use – while preventing consumers from being victimized by bait-and-switch tactics. This reading is supported by the

statute's text, its legislative history, and the principle of constitutional avoidance. It even squares with the limited history of New York's enforcement of the statute, adduced by petitioners to demonstrate its alleged unconstitutionality. Even if analyzed as regulating more than just conduct, the statute – properly read as an anti-deception measure – passes constitutional muster, whether interpreted as a mandatory disclosure (requiring the full price to be prominently displayed) or a restriction of inherently misleading speech (prohibiting a business from displaying a price lower than that actually charged).

Some voices in the case – notably, *not* the parties – have suggested that the Court go much further, arguing that the statute imposes a content-based restriction on speech and should therefore be subject to strict scrutiny. But the case's peculiarities – including the absence of interpretation of the statute by state appellate courts and the lack of a genuine Circuit split, *see Dana's R.R. Supply v. Attorney Gen.*, 807 F.3d 1235, 1247 n.9 (11th Cir. 2015) (noting the material differences in the "the relevant statutory text" of the laws of New York and Florida) – make it a singularly unsuitable vehicle for the development of constitutional doctrine.

There are in addition good reasons for the Court to reject such a far-reaching First Amendment holding. Subjecting content-based commercial speech regulations to strict scrutiny would weaken society's ability to regulate deceptive advertising, to mandate public health and safety warnings, and to require that health

claims – on which consumers stake their well-being and sometimes their lives – be founded on sufficient evidence. Erasing the distinction between commercial and core speech would, ironically, also threaten to weaken protections for the sort of political, artistic and religious expression that lies at the heart of what the First Amendment was designed to safeguard.

There is, in sum, no need in this narrow case to break new ground.

ARGUMENT

I. THE MOST PLAUSIBLE INTERPRETATION OF SECTION 518 AVOIDS CONSTITUTIONAL DIFFICULTY.

The only question genuinely at issue in this case is the proper interpretation of New York's statute. There are no disagreements between the parties concerning First Amendment doctrine. Petitioners agree that a simple prohibition of dual pricing would regulate only economic conduct and would not implicate the First Amendment at all. Expressions Opening Br. at 35. They also agree that a statute prohibiting merchants from misleading consumers by surprising them with hidden surcharges would pass First Amendment review. *Id.* at 42. New York does not dispute that a statute regulating only how a pricing scheme is described would violate the First Amendment. *See* N.Y. Resp. Br. at 27. The parties differ only as to which, if any, of the foregoing describes Section 518.

Petitioners implausibly interpret Section 518 as regulating nothing besides which of two synonymous descriptions merchants may employ for the difference between cash and credit card prices. Expressions Opening Br. at i, 1-2. This interpretation has no grounding in the language of the statute, which says nothing about how prices may be characterized; is patently unconstitutional; and risks reducing the statute to an absurdity.

New York, by contrast, offers a straightforward reading, according to which the statute does not impinge on petitioners' stated interests and easily passes constitutional muster: the statute prohibits the deceptive tactic of attracting customers through low posted, tagged, or advertised prices and then surprising them with unannounced surcharges when they pay with a credit card.

It is this interpretation, whether understood to implicate only conduct or to involve speech, that best explicates Section 518.

A. The No-Surprise Interpretation Is The Most Plausible Reading Of The Statute.

Reading Section 518 to prohibit surprise at the register is a natural way to make sense of the law. As the Court of Appeals found, "a surcharge means an additional amount above the seller's regular price." Pet. App. 14a. (In the absence of a statutory definition, the court relied on the "ordinary meaning" of "surcharge." *Id.* at 13a.) The problem then is determining a seller's

"regular price." The generally prevailing price is irrelevant – a retailer does not violate Section 518 by charging more than competitors. Nor can the "regular price" be the price a given retailer charges most frequently. That would reduce the prohibition on credit card surcharges to a nullity, since many retailers – including petitioners – receive payment for *most* of their sales by credit card. According to petitioners' own officers and owners, credit cards are used in about 90% of Five Points Academy's sales, JA 42 (Stephen Milles Decl.); 80% of Patio.com's, JA 55 (David Ross Decl.); and 60-70% of Brite Buy's. JA 46 (Donna Pabst Decl.).

The only plausible way to define the regular price is, following the Court of Appeals, as the posted price, at least with respect to "sellers who post single, readily ascertainable prices." Pet. App. 15a. This understanding finds support in a letter from the bill's Assembly sponsor, explaining that the meaning of "surcharge" should be "identical to the [federal] definition." JA 86. The federal statute explicitly defined "regular price" in part as "the tag or posted price . . . if a single price is tagged or posted." Cash Discount Act, Pub. L. No. 97-25, § 102, 95 Stat. 144, 144 (1981) (quoted in dist. ct. op., Pet. App. 61a). Extending this definition, when more than one price is displayed (or advertised), the regular price is the most prominent one. Section 518 is violated when a credit card customer has to pay more than that price – a reasonable protection against bait-and-switch pricing.

Legislative history corroborates this interpretation. Memoranda summarizing the no-surcharge bill

for the New York legislature justified the proposed legislation by explaining that without it a merchant could "advertise a certain price and, at the time of the sale, raise or lower the price according to the method of payment," allowing consumers to be subjected to "dubious marketing practices." JA 81, 83. Similarly, the State Consumer Protection Board supported the bill to "insure that customers can depend on advertised claims and prices." JA 89. Credit card surcharges, the Board explained, can impede this goal by "permitting unannounced price increases at the point of sale." *Id.* The Senate sponsor of the bill also described the legislation as providing "essential protection" to consumers. JA 84.

The doctrine of constitutional avoidance also weighs in favor of this reading. By contrast to the "statute-killing definition of 'surcharge'" advocated by petitioners, *Dana's*, 807 F.3d at 1251 (Carnes, C.J., dissenting), the no-surprise interpretation renders the statute constitutional in all applications. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (the Court is "obligated to construe the statute to avoid constitutional problems if it is fairly possible to do so"). "The question is not whether [a saving interpretation] is the most natural interpretation of the mandate, but only whether it is a 'fairly possible' one." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012) (citation omitted). Here the no-surprise interpretation *is* the most natural interpretation. And, as explained *infra*, § I.D., it easily passes constitutional muster.

It is true that "on its face, [Section 518] . . . says nothing . . . about how prominently prices must be displayed." App. 69a-70a (dist. ct. op.). But petitioners' interpretation (which the district court accepted) fares no better on this score – the statute equally says nothing about how price differences may be *labeled*.[3] The statute must mean *something*, and the no-surprise reading is the least problematic option.

Petitioners' interpretation fares far worse than the no-surprise reading in satisfying New York's standards for statutory construction. *See* N.Y. Stat. Law § 145 (a "construction which would make a statute absurd will be rejected"). Even setting aside constitutional concerns, there is little sense in a statute that does nothing other than decree which of two synonymous representations merchants may employ to describe a difference between cash and credit card prices. By contrast, a statute that protects consumers against bait-and-switch pricing easily satisfies New York's

---

[3] If petitioners are right that there is no difference between a prohibition on credit card surcharges and a prohibition on cash discounts, the proper conclusion would be not that the statute regulates how dual pricing may be labeled, but rather that it prohibits dual pricing altogether. Interpreting Florida's similar statute prohibiting "a surcharge . . . for electing to use a credit card," Fla. Stat. § 501.0117(1), the Eleventh Circuit observed that "The statute might appear at first blush to ban . . . dual-pricing," rejecting that reading only because Florida's statute "expressly allowed [merchants] to offer a 'discount for the purpose of inducing payment by cash.'" *Dana's*, 807 F.3d at 1243 (quoting Section 501.0117(1)). Section 518, by contrast, does *not* expressly allow discounts.

codified presumption "that a reasonable result was intended by the Legislature." *Id.* § 143.

The fact that New York law includes a general prohibition against deceptive business practices, N.Y. Gen. Bus. Law § 349(a), does not render superfluous a law singling out surprise credit card surcharges. "[T]here is no authority for the proposition that a saving construction of a statute should be rejected simply because it would create an overlap with another statute." *Dana's*, 807 F.3d at 1255 (Carnes, C.J., dissenting). Just as Florida's general anti-deception statute and its credit card surcharge prohibition are "anything but redundant," since "one statute is criminal while the other is civil," *id.* at 1256, so too are New York's relevant statutes complementary. Section 518 is a criminal statute; New York's general deceptive business practices law is a civil statute. G.B.L § 349(b).

Furthermore, there is nothing unusual in a state's having on its books both a law prohibiting deceptive business practices generally and also laws addressing specific kinds of deceptive practices. California law, for example, includes a general prohibition against "any unfair, fraudulent or unlawful business act or practice," Cal. Bus. & Prof. Code § 17200, but also specifically outlaws 24 enumerated practices in consumer transactions, Cal. Civ. Code § 1770(a), including misrepresenting the geographical origin of goods, *id.* § 1770(a)(4), and representing second-hand goods as new. *Id.* § 1770(a)(6). Similarly, federal law generally prohibits "unfair or deceptive acts or practices in or

affecting commerce," 15 U.S.C. § 45(a)(1), but also specifically outlaws certain deceptive practices by, among others, debt collectors, *id.* § 1692; credit reporting agencies, *id.* § 1681; and credit card issuers. *Id.* § 1601. Nor is Section 518 the only more specific prohibition with which New York supplements its general anti-deception statute. *See, e.g.*, N.Y. R. Prof. Conduct 7.1(c), (1) (prohibiting specific communications in attorney advertising); G.B.L. § 396-cc (restricting deceptive senior discount advertising); *id.* § 396-d (restricting misleading advertisements for real property).

Contrary to petitioners' argument that the exemptions to New York's no-surcharge statute undermine the statute's claimed purpose of preventing deception, Expressions Opening Br. at 40-41, the exemptions actually *support* the anti-deception interpretation. They concern mandatory payments, where concern about attracting consumers through misleading pricing is inapplicable. *See* N.Y. Crim. Proc. Law § 420.05 (allowing fees when a credit card is used to pay "a fine . . . upon an individual who stands convicted of any offense"); N.Y. Gen. Mun. Law § 5(c) (allowing service fees for credit card payments to local governments).

B. New York's Past Enforcement Of The Statute Is Consistent With The No-Surprise Interpretation.

New York's past enforcement actions comport with the no-surprise interpretation of Section 518 (and the First Amendment), as would potential future actions

against petitioners if they engage in the pricing conduct they have proposed.

The clearest violation occurs when a merchant posts one price but then charges more for credit card purchases at the register. By extension, if both cash and credit card prices are posted, the statute is likely violated if the credit card price is significantly less prominent (for example, in significantly smaller font or in an obscure location). Indeed, New York may go further, and require that the credit card price be announced no less prominently than the cash price.

Similarly, New York may assert that Section 518 is violated if the *total* credit card price is not prominently announced. The statute is meant to dispel confusion. So it is not enough to post "$82.50 + 2.5% surcharge if paying by credit card"; the total price of $84.56 needs to be posted. As New York aptly observed below, "It is not hard to imagine consumer confusion resulting from the need to engage in multiple math problems (*e.g.*, comparing a 3% credit-card surcharge in one store with a 2% cash discount in another store) to understand the best price." N.Y. Opening Br. (Ct. App.) at 9.

An instructive parallel is found in the D.C. Circuit's treatment of a rule requiring that advertised airfares "disclose the 'entire price to be paid.'" *Spirit Airlines, Inc. v. U.S. Dept. of Transp.*, 687 F.3d 403, 408 (D.C. Cir. 2012) (quoting 14 C.F.R. § 399.84(a)). The court upheld the DOT's interpretation, according to which airlines were free to explain the breakdown

among base fare, taxes and fees – and even to editorialize by characterizing the last as the "Government's Cut" – but were nonetheless subject to the requirement "that the total, final price be the most prominently listed figure, relying on the reasonable theory that this prevents airlines from confusing consumers about the total cost." *Id.* at 411. Similarly, Section 518 does not prohibit sellers from describing (in advertisements or point-of-sale postings) the higher price as a "surcharge" for credit card use – or for that matter a "surcharge to recover costs unfairly imposed by credit card companies" – or adding other commentary. However, New York may require "that the total [credit card] price be the most prominently listed figure." *Id.*

In sum, Section 518 does not prevent merchants from posting or advertising two prices and adding any desired characterization, however pointed, of the credit card price. What the statute does require is that the higher price be clearly announced – that is, it must be prominently displayed and not left as a math problem.

This understanding of Section 518 makes sense of the only enforcement of the statute that has generated written opinions. The dispute in *People v. Fulvio*, 517 N.Y.S. 2d 1008 (Crim. Ct. 1987), concerned a gas station customer who complained, having pumped gas after presenting his credit card, "that the price being registered was five cents per gallon higher than the price on the sign on the top of the pump." *Id.* at 1010. The court's discussion focused on the red herring of whether station personnel, when subsequently explaining the price discrepancy, described the price

difference as a credit card surplus or cash discount. *Id.* at 1010-15. But, from the court's own description of events, the customer's dissatisfaction clearly had to do not with the wording of the explanation, but with the fact that the cashier had explained the dual pricing "*after* he pumped his gas," *id.* at 1010 (emphasis added), since he had "been attracted by the price displayed on signs at the station." *Id.* at 1009. This sort of unfair surprise is precisely what Section 518 was intended to prohibit.[4]

The need to make clear the total price in the initial communication may also explain the state's actions against heating oil companies. Expressions Opening Br. at 17-18, 29. It seems likely that the Attorney General's investigators, rather than regulating how the difference between cash and credit card prices was described, were simply requiring that, when responding to phone inquiries, the higher price be quoted first to avert customer confusion (corresponding to the requirement that the total credit card price, if higher, be the most prominently posted price on-site).[5]

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[4] The owner testified that his signs "clearly stated the 'cash price' and the 'credit price,'" *id.* at 1010, but that was evidently not the customer's perception. Nothing was said about how prominently the credit card price was displayed, and the court made no finding as to whether it was displayed at all, dismissing the issue as irrelevant. *Id.* at 1011-12.

[5] Rather than imposing a "script," Expressions Opening Br. at 18, more likely investigators explained that a seller could legally respond, for example, something like "We charge $3.50 per gallon, but offer a 5¢ per gallon discount for cash payment," but could not respond, "We charge $3.45 per gallon, but add a 5¢ per

C. The No-Surprise Interpretation Makes Reasonable New York's Intention To Enforce The Statute Against Petitioners.

Under the no-surprise reading of Section 518, the Attorney General is correct that at least some of what petitioners propose to do would violate the statute. Expressions Hair Design wishes to "list with equal prominence both the cash price and the additional credit-card charge – expressed as a percentage – without also displaying the total credit-card price as a dollar figure." JA 104 (Supp. Decl. Linda Fiacco). Five Points Academy similarly does not plan "to display two separate prices for each good and service that we offer, but rather to display – with roughly equal prominence – a single set of prices and the credit card surcharge amount." JA 101-02 (Supp. Decl. Stephen Milles). Under the proposed construction, both businesses would violate the statute by not making explicit the total price to be paid by credit card consumers.

By contrast, Patio.com seeks only "to add a line item to the receipt that illustrates the payment processing costs that Patio.com incurs when customers

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gallon surcharge for credit card payment." Such examples could easily have led some sellers to believe that what mattered was whether the price difference was described as a discount or surcharge, *see, e.g.* JA 107 (Decl. Michael Parisi, ¶ 8), when in fact the issue was whether the higher price was quoted first. The sellers failed to understand that they could still have communicated their view of swipe prices by stating, for example, "We charge $3.50 per gallon, which includes a 5¢ per gallon surcharge to cover the costs imposed on us by credit card companies. You can avoid this surcharge by paying cash."

pay with credit cards." JA 56 (Supp. Decl. David Ross). Adding such a line item would *not* violate the statute. The remaining petitioners state only that they wish to offer dual pricing and to label the price difference a credit card "surcharge," rather than a cash "discount." JA 46-48 (Supp. Decl. Donna Pabst); JA 51-53 (Supp. Decl. Peter Freeman). These statements leave unclear whether they would be violating the statute. It seems likely, however, that at least Brooklyn Farmacy intends not to state total credit card prices in its advertisements, *see* JA 52 (surcharges "would make our advertised prices look higher than they are"), an omission that would constitute a violation.

D. Under the No-Surprise Interpretation, the Statute Clearly Comports with the First Amendment.

Properly read, Section 518 does not violate the First Amendment. It regulates the commercial conduct of selling at higher prices than posted or advertised. *See* N.Y. Resp. Br. at 22-39. Even if it is taken to regulate speech, the statute easily passes constitutional muster, whether analyzed as imposing a disclosure (prominent display of the total credit card price) or a restriction (prohibiting other prices or descriptions of price to be displayed more prominently).

1. Analyzed as a disclosure requirement, Section 518 is constitutional.

If analyzed as a regulation of speech, the statute is best understood as a disclosure requirement – one that easily withstands constitutional scrutiny. Posting the highest total price clearly and prominently gives consumers notice about what they can expect to pay. The district court's contrary conclusion that Section 518 is actually "an *anti*-disclosure statute" because it "bar[s] a seller from disclosing its cash price even marginally more conspicuously than its credit-card price," Pet. App. 75a (emphasis in original), is reminiscent of reasoning persuasively rejected by the D.C. Circuit: "[T]he airlines claim that the rule . . . imposes an affirmative limitation on speech . . . [by] prohibiting them from posting other numbers as prominently or more prominently than the total, final price." *Spirit Airlines*, 687 F.3d at 413-14. But, the court explained, "affirmative limitations on speech" are rules that flatly prohibit certain kinds of speech. *Id.* at 414 (citing, *inter alia*, the prohibition on promotional advertising by electric utilities struck down in *Central Hudson*, 447 U.S. 557 (1980) and the prohibition on disseminating drug price information struck down in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)). By contrast, the challenged rule did "not prohibit airlines from saying anything; it just require[d] them to disclose the total, final price and to make it the most prominent figure in their advertisements. . . . [T]his neither prohibit[ed]

nor significantly burden[ed] airlines' ability to provide [other] information." *Id.*

Any requirement that a disclosure be prominent in relation to other text necessarily limits the prominence of other messages the speaker might wish to convey. If that were enough to constitute a limitation on speech, then any number of unproblematic consumer and public health protections would be subject to heightened review under *Central Hudson*. *See, e.g.*, 15 U.S.C. § 1261(p)(2) (safety warnings on hazardous substances must be prominently located, in conspicuous type, and stand out); 21 U.S.C. § 343(q)(1) (regulators may mandate that some required nutritional information "be highlighted on the label . . . by larger type, bold type, or contrasting color"); 21 C.F.R. § 202.1(e)(7)(viii) (prescription drug advertisements must present side effects and contraindications comparably prominently with information about effectiveness). *See also Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 524, 567 (6th Cir. 2012) (upholding requirements that health warnings occupy the top 50% of the front and back of cigarette packaging, and 20% of print tobacco advertisements).

Likewise, if requiring that the credit card price posted as a dollar total constitutes a speech restriction, then so does mandating that lenders must state the cost of credit as an annual percentage rate, 15 U.S.C. § 1665a, or that regulators specify the format, content, and units of measurement for nutritional labels on foods. 21 C.F.R. § 101.9. Indeed, California imposes a similar requirement more generally, prohibiting

"[a]dvertising that a product is being offered at a specific price plus a specific percentage of that price unless (1) the total price is set forth in the advertisement . . . in a size larger than any other price." Cal. Civ. Code § 1750(a)(20).[6]

Because the requirements that the credit card price be posted as a total dollar amount and be prominently displayed are ordinary disclosures, they are reviewed under the "reasonable relationship" standard of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). And since, like the required disclosures in that case, prominent display of the full credit card price is "reasonably related to the State's interest in preventing deception of consumers," *id.* at 651, Section 518 passes constitutional muster.

2. Analyzed as a speech restriction, Section 518 is constitutional.

Section 518 passes constitutional muster even if analyzed (incorrectly) as a restriction on commercial speech.[7] Inherently deceptive communications receive

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[6] And while Section 518 does not, as petitioners claim, prohibit describing price differences as "surcharges," federal law in some circumstances does precisely that. *See, e.g.*, 31 C.F.R. § 50.12 (insurers may not describe cost of mandatory terrorism coverage as a "surcharge").

[7] If Section 518 regulates speech, the regulated speech is entirely commercial, as the parties agree. There is no merit to the Eleventh Circuit's conclusion that a no-surcharge law limits not just commercial speech, but also "elements of core political speech," because it might interfere with the ability of merchants to make clear the cost of credit card use and thereby influence

no constitutional protection. "The government may ban forms of communication more likely to deceive the public than to inform it." *Central Hudson*, 447 U.S. at 563. *See also Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) ("misleading" commercial speech "is not protected by the First Amendment"); *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) ("the State may ban commercial expression that is . . . deceptive without further justification"). Moreover, empirical evidence that consumers were actually misled is not necessary "[w]hen the possibility of deception is . . . self-evident." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010) (citations and quotation marks omitted); *accord In re R.M.J.*, 455 U.S. 191, 202-03 (1982) ("where . . . particular advertising is inherently likely to deceive . . . advertising may be prohibited entirely").

Advertising or displaying a price without disclosing that most customers will have to pay more than

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debate about what those costs should be and who should bear them. *Dana's*, 807 F.3d at 1247. Potential impact on policy disputes does not lift the affected communications out of the province of commercial speech; to the contrary, such impact was a principal justification for extending constitutional protection to commercial communications in the first place. *See Bates v. State Bar*, 433 U.S. 350, 364 (1977) (commercial speech is protected in part because it "may often carry information of import to significant issues of the day"); *Va. State Bd.*, 425 U.S. at 765 ("the free flow of commercial information is indispensable" to "intelligent and well informed" "allocation of . . . resources" in a free enterprise system, and "also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered").

that price because they use a credit card is as inherently misleading[8] as "hold[ing] out the promise of debt relief without alerting consumers to its potential cost." *Milavetz*, 559 U.S. at 251. As in *Milavetz*, the "likelihood of deception . . . is hardly . . . speculative." *Id.* (citation and quotation marks omitted). As the D.C. Circuit held in *Spirit Airlines*: "Based on common sense and over three decades of experience and complaints, DOT concluded that it was deceitful and misleading when the most prominent price listed by an airline is anything other than the total, final price of air travel." 687 F.3d at 413. Common sense and experience support a similar conclusion here.

Under the "no-surprise" reading of the statute, Section 518 comports easily with the First Amendment, even if analyzed as a restriction on speech rather than conduct.

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[8] Even if the evidence supported petitioners' contention that the legislation was also motivated by the credit card industry's desire to hide the costs of credit, the statute could still be upheld as an anti-deception statute. When a statute has both legitimate and illegitimate purposes, it may be upheld under even heightened First Amendment scrutiny in light of its legitimate purpose. *See Washington State Grange v. Wash. State Republican Party*, 552 U.S. 442, 446 (2008) (after "reject[ing] as illegitimate three of the [state's] asserted interests" under strict scrutiny, proceeding to consider whether "the remaining interests . . . were . . . compelling"); *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010) (after finding first of two proffered interests sufficient to satisfy intermediate scrutiny, concluding there was no need to consider the second).

II. THERE IS NO NEED FOR RADICAL CHANGE IN THE REGULATION OF COMMERCIAL SPEECH.

With the proper interpretation of Section 518, the First Amendment challenge to the law is readily disposed of. Not even the full *Central Hudson* analysis need be brought to bear. Nonetheless, some *amici* have called for far-reaching First Amendment holdings, not because such holdings would be useful in resolving this case, but because the *amici* seek to use this case as a vehicle for overturning decades of this Court's precedent and establishing equivalent constitutional protection for commercial speech and core political, artistic or religious speech. The Court may readily decline the invitation to extraordinary activism that these briefs extend.

The briefs urge strict scrutiny, on the ground that Section 518 imposes a content-based limitation on speech, Cato Inst. Br. at 10-13; Albertson's Br. at 11-16, even though this Court has never applied strict scrutiny to regulations of commercial speech. But as even petitioners agree, Expressions Opening Br. at 35-36, there is no call for any such disruption of settled practice in this case. And the radical shift that these briefs call for would create havoc for established regulatory regimes, would drastically undermine the ability of the government to protect and inform its citizens, and would dilute protection for the types of speech that most require the aegis of the First Amendment.

A. The Doctrine That Content-Based Speech Regulations Are Subject To Strict Scrutiny Has Never Been Applied To Commercial Speech.

This Court "has rejected the argument that strict scrutiny should apply to regulations of commercial speech that are content-specific." *Anderson v. Treadwell*, 294 F.3d 453, 460 (2d Cir. 2002). *See also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) ("regulation of commercial speech based on content is less problematic"); *Central Hudson*, 447 U.S. at 564 n.6 (unlike "most other contexts . . . features of commercial speech permit regulation of its content"). Every commercial speech restriction upheld by the Court has been content-based. *See, e.g., Florida Bar v. Went For It*, 515 U.S. 618 (1995) (limitations on lawyer advertising); *Bd. of Trustees of State Univ. v. Fox*, 492 U.S. 469 (1989) (prohibition on product demonstrations in state university dormitories); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (restrictions on attorney solicitation of clients).

Recent decisions have not changed this principle. Although the Court discussed the constitutional infirmities of content-discriminatory regulations in sweeping terms in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565-67 (2011), it acknowledged that the speech before it in that case might be commercial and might therefore be subject to only intermediate scrutiny. *Id.* at 571. The Court further signaled that content neutrality was not always required for commercial speech laws. *See* 564 U.S. at 579 ("a State may choose to regulate price

advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there") (citation and quotation marks omitted; ellipsis in original).

The Court again stated the link between content-based laws and strict scrutiny in broad terms in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227-28, 2231 (2015), but that case did not concern – and never addressed – commercial speech. Given that subjecting content-based commercial speech laws to strict scrutiny would effectively eliminate commercial speech as an analytic category (the distinction between commercial and noncommercial speech is itself content-based), it is implausible that *Reed* extends so far. If this Court had intended to upend decades of commercial speech jurisprudence, it would have said so. "This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

Lower courts have mostly concurred that the holdings of *Reed* do not apply to commercial speech. The Eleventh Circuit squarely rejected the applicability of *Reed*, even as it struck down Florida's no-surcharge statute: "[T]he general rule that content-based restrictions trigger strict scrutiny is not absolute. Content-based restrictions on certain categories of speech such as commercial and professional speech, though still protected under the First Amendment, are given more leeway because of the robustness of the speech and the greater need for regulatory flexibility in those areas." *Dana's*, 807 F.3d at 1246. *See also Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1201

n.3 (9th Cir. 2016) ("although laws that restrict only commercial speech are content based, *see Reed* . . . , such restrictions need only withstand intermediate scrutiny"); *Mass. Ass'n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 192 (D. Mass. 2016) ("Although only a small number of courts have addressed First Amendment challenges to commercial-speech regulations since *Reed*, almost all of them have concluded that *Reed* does not disturb the Court's longstanding framework for commercial speech"); *CTIA-The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061 (N.D. Cal. 2015) ("The Supreme Court has clearly made a distinction between commercial speech and noncommercial speech, . . . and nothing in its recent opinions, including *Reed*, even comes close to suggesting that that well-established distinction is no longer valid"); *Timilsina v. W. Valley City*, 121 F. Supp. 3d 1205, 1215 (D. Utah 2015) ("Because the parties agree this case concerns commercial speech . . . , the Court need not address how the regulation would fare under . . . *Reed*").

B. Most Commercial Speech Regulations Are Content-Based.

To apply strict scrutiny to all commercial speech regulations that are in any way content-based would effectively extinguish the distinction between commercial speech and core speech, since most commercial speech regulations are content-based. Indeed, many are not even viewpoint-neutral.

"Commercial speech regulation is by its nature content-based. Such regulations definitionally target commercial speech and normally certain forms of commercial expression." Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 146-47 (2016). Commercial speech restrictions typically target speech of a certain sort that is considered deceptive or otherwise harmful, and thus are content-based. To protect public health, for example, manufacturers may not – absent certain specified conditions – disseminate written information about the benefits of unapproved uses of drugs and medical devices approved for sale. 29 C.F.R. § 99.101. To prevent consumer deception, consumer credit providers, for example, are prohibited from making various misleading representations, including advertising credit terms that they do not usually arrange. 15 U.S.C. § 1662.

Commercial *disclosure* requirements, in particular, are of necessity both content- and speaker-based. "By definition, all mandatory disclosures require some defined class to say something rather than something else." Shanor, *supra* at 178. These requirements either prescribe specific content, *e.g.*, 27 U.S.C. § 215(a) (stating precise wording of warning label required on alcoholic beverage containers), or define a certain content area that must be addressed, *e.g.*, 21 U.S.C. § 343(q)(1)(C) (requiring food labels to state calories per serving), while applying only to certain speakers (sellers of alcohol or food, in the foregoing examples).

Even if only disclosures *triggered* by certain speech content are considered "content-based," it would not

make sense to subject those disclosures in particular to more stringent scrutiny. It defies belief that, for example, requiring warnings of the hazards of smoking on *all* advertisements for *all* products would be less offensive to the First Amendment than the content-based approach of requiring such warnings only in ads for cigarettes and similar products. *See American Meat Inst. v. United States Dept. of Agriculture*, 760 F.3d 18, 33 n.1 (Kavanaugh, J., concurring in judgment) (D.C. Cir. 2014) ("The First Amendment does not tolerate a government effort to compel disclosures unrelated to the product or service – for example, a compelled disclosure on all food packages (not just cigarette packages) that cigarette smoking causes cancer").

In cases involving compelled commercial speech, this Court has applied lenient review in upholding required disclosures of specific content by specific speakers triggered by specific speech content. *See Milavetz*, 559 U.S. at 233 (requiring specific content, including the statement "We are a debt relief agency," triggered by specific speech content – offers of debt relief); *Zauderer*, 471 U.S. at 650 (requiring specific content, including that legal clients might be liable for litigation costs, triggered by specific content – offers of legal representation on contingency).

Indeed, this Court has applied less than strict scrutiny even when reviewing commercial speech regulation that distinguishes on the basis of *viewpoint*. The prohibition reviewed in *Central Hudson* itself was not viewpoint-neutral: it prohibited electric utilities

from promoting electricity use, without any corresponding prohibitions on promotion of electricity conservation. 447 U.S. at 559.

Many unexceptionable commercial disclosure requirements likewise fail the viewpoint neutrality test. Requiring alcoholic beverage labels to state, "Women should not drink alcoholic beverages during pregnancy because of the risk of birth defects," 27 U.S.C. § 215(a), is not viewpoint-neutral, however uncontroversial that viewpoint may be, nor is a requirement that certain hazardous substances carry the instruction "Keep out of the reach of children." 15 U.S.C. § 1261(p)(1)(J)(i). Such laws have never been deemed subject to heightened review.

In sum, because content-based and even viewpoint-based distinctions of necessity pervade regulations touching on commercial speech, applying to commercial speech the rule that laws distinguishing between categories of speech based on content automatically trigger strict scrutiny would effectively end any distinction between standards for reviewing laws regulating commercial speech and standards for reviewing regulations of core political or expressive speech.

C. Subjecting Commercial Speech Regulations To Strict Scrutiny Would Severely Impair Government's Ability To Protect Public Health And Safety, Prevent Consumer Deception, And Safeguard The Public And Businesses From Other Commercial Harms.

A formalistic application of identical standards for the review of laws regulating commercial speech and core political or expressive speech would have serious practical consequences for efforts to protect public health and welfare. "[T]he State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 499 (1996) (plur. op.) (citation omitted). Since all commerce is conducted in words, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), enhancing protections for commercial speech threatens government's ability to regulate *any* commercial conduct, no matter how unsafe or detrimental to the public. If the doctrine that "First Amendment freedoms need breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963) is applied to commercial speech, it is unclear what would remain of Congress's power "[t]o regulate commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3.

A host of important protections would be endangered. Identical treatment of commercial and core speech could imply that straightforward disclosure requirements – whether of important nutritional

information, threats to public health and safety, or financial risks – should be subject to the same standard of review, almost invariably fatal, as compelled speech that deeply violates the conscience. It could likewise mean maximal protection for even deceptive or predatory commercial advertising, as well as for unfounded health and medical claims with potentially grave consequences.

Distinguishing commercial speech is critical even with respect to "truthful, nonmisleading commercial speech," *44 Liquormart*, 517 U.S. at 503. The quest for abstract symmetry does not justify eliminating the pragmatic distinction that applies more lenient scrutiny to vital laws that, for example, enhance privacy. *See, e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692e (prohibiting "publication of a list of consumers who allegedly refuse to pay debts"); Fair Credit Reporting Act, 15 U.S.C. §§ 1681b & 1681e (limiting "redisclosure of medical information" and restricting provision of investigative consumer reports containing criminal records, civil judgments or tax records "unless the agency has verified the accuracy of the information"). Even very general protections, such as the Do Not Call registry, 15 U.S.C. § 6151; 16 C.F.R. § 310.4(b)(1)(iii)(B) (restricting commercial autodialed calls), *upheld by Mainstream Marketing Svces., Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004), or the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (forbidding junk faxes and text messages), *upheld by Nixon v. American Blast Fax, Inc.*, 323 F.3d 649, 654-55 (8th Cir. 2003), could be subject to strict scrutiny as content-based

speech restrictions since they allow content-based exceptions. *See, e.g.*, 47 U.S.C. § 227(b)(1)(A) (exempting calls for emergency purposes from prohibition against automated calls); *id.* § 227(b)(2)(F) (allowing regulators to exempt certain advertisements from tax-exempt professional and trade associations to members from certain rules regulating junk faxes); 47 C.F.R. § 64.1200(a)(3)(v) (exempting certain "health care" messages from prohibition against prerecorded commercial telemarketing calls).[9]

1. Content-based regulations of commercial speech are important for protecting consumers and businesses from being misled.

With respect to core speech, even deliberately false statements may be protected, because allowing government to prohibit them would "give government a broad censorial power" and would cast "a chill the First Amendment cannot permit." *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012). Until now the same level of protection has not been extended to deceptive speech

[9] The dangers of subjecting all content-based speech regulations to strict scrutiny extend even further, likely impairing the ability to regulate professional speech as well. Until now the First Amendment has not been thought to protect the right of doctors, for example, "to give whatever opinion they choose to their patients, regardless of whether it is misleading or incompetent." Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 178 (2015). "Does anyone believe that every Enron accountant is entitled to his or her opinion, regardless of generally accepted accounting practices?" *Id.* at 181.

"used to gain a material advantage." *Id.* But such a distinction could not survive if content-based commercial speech is subjected to the same level of scrutiny as political speech.

Many federal and state statutes and regulations proscribe specific content-based categories of deceptive commercial speech. To cite just a few examples, debt collectors are barred from falsely representing that they are affiliated with government or that they are attorneys, 15 U.S.C. § 1692e(1)-(3); advertisements may not use the word "profit" to describe interest payments, 12 C.F.R. § 230.8(a)(1)-(2); restaurant menus, postings, and advertising may not misrepresent the identity of food products, N.J. Stat. § 56:8-2.9; and sellers of prescription drug discount cards may not advertise false discounts. Tex. Bus. & Com. Code § 17.46(b)(18).

Even general prohibitions of deceptive commercial speech are often content-based in that they exclude certain categories of speech. *See, e.g.*, Tenn. Code § 47-18-111(a)(3) (exempting credit terms of most transactions from requirements of state Consumer Protection Act of 1977, including prohibition on deceptive statements); N.J. Stat. § 56:8-140(e) (exempting public utilities from all provisions of Consumer Fraud Act, including prohibitions of various misrepresentations to consumers); Md. Code Com. Law § 13-104(1) (exempting services of specified professionals from general provisions of title, including prohibitions on various commercial misrepresentations).

2. Content-based regulations of speech are critical for protecting public health.

Public health protections would likewise be at risk if content-based restrictions of commercial speech were subject to strict scrutiny. Regulation of health-related advertising claims in advertising extends far beyond prohibition of false claims; positive substantiation is required for what in other contexts would be considered protected expression of opinion. *See, e.g.*, 21 U.S.C. § 343(r)(6)(B) (health claims for dietary supplements are prohibited without substantiation that they are true and not misleading); *see also POM Wonderful, LLC v. F.T.C.*, 777 F.3d 478, 500 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 1839 (2016) (upholding under *Central Hudson* review portions of FTC order barring future representations of a product's health benefits unless backed by sufficient competent and reliable evidence, including a randomized controlled trial with statistically significant results); *Thompson Med. Co. v. FTC*, 791 F.2d 189, 193 (D.C. Cir. 1986) (declining "to hold that firms may not be prevented from advertising their products as efficacious until they are proved otherwise," and upholding F.T.C. order requiring at least two well-controlled, double-blinded clinical studies before manufacturer could make claim about pain relief).[10] The importance of such regulation cannot be

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[10] *But see United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012) (striking down prohibition on advertising unapproved uses of FDA-approved drugs under *Central Hudson* review). The dissent noted that the decision "call[ed] into question the very

overstated. The FDA estimates that over two million serious adverse drug reactions occur annually, with over 100,000 fatalities. FDA, *Preventable Adverse Drug Reactions* (updated 2016).[11] *See also* FDA, *FAERS Reporting by Patient Outcomes by Year*, Fig. 4 (2015)[12] (over 100,000 fatalities in official reporting for last three years that totals were available).

Even prior restraints to protect public health are accepted in the context of commercial speech. *See, e.g.*, Family Smoking Prevention and Tobacco Control Act, 21 U.S.C. § 387k(g)(1) (requiring prior FDA approval before tobacco products may be advertised as "modified risk" (upheld in *Disc. Tobacco*, 674 F.3d at 532-37, after determining that the regulation reached only commercial speech, *id.* at 533); 21 C.F.R. § 202.1(j)(1) (advertisements may not "be disseminated without prior approval" for prescription drugs that may cause serious damage that has not been sufficiently publicized).

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foundations of our century-old system of drug regulation"). *Id.* at 169 (Livingston, J., dissenting).

[11] *At* http://www.fda.gov/Drugs/DevelopmentApprovalProcess/DevelopmentResources/DrugInteractionsLabeling/ucm110632.htm#ADRs:%20Prevalence%20and%20Incidence

[12] *At* http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Surveillance/AdverseDrugEffects/ucm070461.htm

3. The public relies on content-based mandatory disclosures for protection from serious harm.

If compelled commercial disclosures are subjected to strict scrutiny as "content-based burden[s] on protected expression," *IMS*, 564 U.S. at 565, an enormous swath of protections relied on by the public would be at risk. "Innumerable federal and state regulatory programs require the disclosure of product and other commercial information. . . . To . . . expose these long-established programs to searching scrutiny by unelected courts . . . is neither wise nor constitutionally required." *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001).

Even if the doctrine were thought to extend to only those mandatory disclosures triggered by specific advertising content, a panoply of consumer protections against victimization by misleading or incomplete representations would be at risk. *See, e.g.*, Truth in Lending Act, 15 U.S.C. §§ 1663, 1664, 1665a, 1665b (requiring advertisements for credit to include specified disclosures); Securities and Exchange Act of 1933, 15 U.S.C. § 77j, 17 C.F.R. Pt. 230 (investments marketed to the public must disclose specified information in prospectus).

Public health and safety are similarly protected by a host of disclosure requirements triggered by specific advertising content. Such measures are crucial in guarding against the grave consequences of misuse of prescription and even over-the-counter drugs. About

30% of fatalities from adverse drug reactions are attributed to labeling and packaging deficiencies. Inst. of Medicine, *Preventing Medication Errors* 275 (2007).[13] The Federal Trade Commission Act requires advertisements to disclose possible consequences of using the advertised commodity, and mandates that drug advertisements enumerate and quantify ingredients. 15 U.S.C. § 55(a)(1). The Food, Drug, and Cosmetic Act similarly requires disclosures of possible consequences of drug use in advertisements. 21 U.S.C. § 321(n). Prescription drug advertisements must include presentation of hazards "reasonably comparable with the presentation of information relating to effectiveness of the drug." 21 C.F.R. § 202.1(e)(viii).

Other disclosures safeguard against other serious threats to health. At least 20% by area of print smokeless tobacco advertisements must be devoted to specified health warnings. 15 U.S.C. § 1402(b)(2)(B). To reduce the spread of infections, multi-dose diabetes pen devices must bear the warning "For single patient use only." FDA, *Drug Safety Communication: FDA Requires Label Warnings to Prohibit Sharing of Multi-Dose Diabetes Pen Devices Among Patients* (Feb. 25, 2015).[14] Manufacturers must notify motor vehicle owners of safety defects. 49 U.S.C. § 30188(b)(2)(A). Advertisements for distilled liquor must include, among other disclosures, a statement of alcohol content, as a

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[13] *At* https://www.nap.edu/download/11623

[14] *At* http://www.fda.gov/downloads/Drugs/DrugSafety/UCM435289.pdf

percentage by volume. 27 C.F.R. § 5.63(c)(1). As a condition of marketing securities for investment in their operations, mine operators must report information about health and safety violations to the S.E.C. 15 U.S.C. § 78m-2. Providers of long-term care insurance are in many states required to provide certain disclosures as a condition of marketing their products. *E.g.* Okla. Stat. tit. 36 § 2043; Minn. Stat. § 62A.50; Idaho Code Ann. § 41-4605.

Required nutritional disclosures can also have life-or-death consequences. Hypertension sufferers rely on nutritional disclosures concerning sodium content in prepared food, 21 C.F.R. § 101.9(c)(4); diabetics similarly rely on disclosures of sugar content, *id.* § 101.9(c)(6)(ii); obese heart patients rely on disclosures of total calories, *id.* § 101.9(c)(1); people with food allergies rely on required labeling, 21 U.S.C. § 343(w), to inform them of the presence of food ingredients that may be life-threatening to them.

D. Expanding Protections For Commercial Speech Could Weaken Protection For Core Speech.

No less worryingly, if all content-based speech is treated alike, the need to regulate commerce and protect public health and safety would likely lead in practice, if not in doctrine, to a weakening of standards of review, so as ultimately to *diminish* protections for the sort of political, artistic and religious expression that

lies at the heart of what the First Amendment safeguards. "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 at 456; *accord Florida Bar*, 515 U.S. 618, 623 (1995). *See also Mastrovincenzo v. City of New York*, 435 F.3d 78, 92 (2d Cir. 2006) ("To say that the First Amendment protects the sale or dissemination of all objects . . . would entirely drain the First Amendment of meaning"); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 10 (2000) ("Nothing could be more damaging to the First Amendment than to . . . transform it into a mere basis for reviewing economic regulations"). Does the Constitution really require that laws regulating commercial telemarketers (but exempting certain communications) be accorded the identical level of scrutiny as laws prohibiting citizens from criticizing government policies?

To equate mandatory factual commercial disclosures with compelled speech against conscience "trivializes the freedom protected in *Barnette* and *Wooley*." *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 62 (2006) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) and *Wooley v. Maynard*, 430 U.S. 705 (1977)). Factual disclosures do not "prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion," *Barnette*, 319 U.S. at 637; "invade the sphere of intellect and spirit," *id.* at 642; or require citizens to disseminate messages

"repugnant to their moral, religious, and political beliefs." *Wooley*, 430 U.S. at 707. If a regulation requiring a manufacturer to disclose the net weight of its saltine crackers is subject to scrutiny identical to that appropriate for a public university's requirement that all instructors sign a loyalty oath, protections of "the sphere of intellect and spirit" are likely to be "devitaliz[ed]" by "a leveling process." *Ohralik*, 436 U.S. at 456.

CONCLUSION

Under the most plausible reading of Section 518, the statute readily passes muster under the First Amendment. The issues here provide no reason to reconsider commercial speech doctrine, and settled societal expectations militate strongly against doing so. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Identity and Interest of *Amici Curiae*

Action on Smoking and Health

Action on Smoking and Health (ASH) is the nation's oldest anti-tobacco organization. ASH is dedicated to ending the global death, disease and damage caused by tobacco consumption and nicotine addiction, through public policy, litigation and public education.

American Thoracic Society

The American Thoracic Society (ATS) is an international educational and scientific organization founded in 1905 that represents more than 16,000 health care professionals. ATS works to prevent and fight respiratory disease around the globe through research, education, patient care, and advocacy. Its membership includes experts on respiratory occupational health. ATS publishes three peer-reviewed scientific journals that disseminate groundbreaking research, including studies on health effects of tobacco use.

National Association of County and City Health Officials

The National Association of County and City Health Officials (NACCHO) is the voice of the 2,800 local health departments across the country. Local health departments develop policies and create environments that make it easier for people to be healthy and safe,

including informing the public of the hazards of tobacco use, reducing youth access to tobacco, and limiting exposure to secondhand smoke.

Public Good Law Center

The Public Good Law Center is a public interest law firm dedicated to the proposition that all are equal before the law. Through *amicus* participation in cases of particular significance for consumer protection, public health, and civil liberties, Public Good seeks to ensure that the protections of the law remain available to everyone. Public Good has submitted *amicus* briefs in this Court and in Courts of Appeals around the nation in cases involving freedom of speech and the disclosure of information important to consumers, as well as cases involving fair debt collection practices, predatory lending, credit reporting abuses, and other matters of direct and immediate consequence to low-income individuals.

Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a national network of nonprofit legal centers that provides technical assistance to public officials, health professionals, and advocates concerning legal issues related to tobacco and public health. The Consortium serves as *amicus curiae* in cases where its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. Many of the Consortium's briefs – in the United States Supreme Court,

United States Courts of Appeals, and state and federal courts around the nation – have addressed issues related to federal preemption and state and local government authority to regulate the sale of tobacco products, as well as First Amendment issues concerning the regulation of tobacco promotion. The Consortium exists to protect the public from the devastating health consequences of tobacco use. It has a strong interest in maintaining state and local governments' authority to ensure that their communities are informed about those consequences.

The Tobacco Control Legal Consortium's activities are coordinated through the Public Health Law Center, at the Mitchell Hamline School of Law in St. Paul, Minnesota. The Consortium's affiliated legal centers include: ChangeLab Solutions, Oakland, California; Legal Resource Center for Tobacco Regulation, Litigation & Advocacy, at the University of Maryland Francis King Carey School of Law, Baltimore, Maryland; Smoke-Free Environments Law Project, at Center for Social Gerontology, Ann Arbor, Michigan; Tobacco Control Policy and Legal Resource Center at New Jersey GASP, Summit, New Jersey; and the Public Health Advocacy Institute and the Public Health and Tobacco Policy Center, at Northeastern University School of Law, Boston, Massachusetts.

RECORD AND BRIEFS

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EXPRESSIONS HAIR DESIGN, et al.,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICI CURIAE AHOLD U.S.A., INC., ALBERTSONS LLC, H.E. BUTT GROCERY CO., HY-VEE, INC., THE KROGER CO., SAFEWAY INC., SPIRIT AIRLINES, INC., AND WALGREEN CO. IN SUPPORT OF PETITIONERS

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Am. Civil Liberties Union of Ill. v. Alvarez,
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Barnes v. Glen Theatre,
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Burwell v. Hobby Lobby Stores,
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Cahaly v. Larosa,
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Cent. Radio Co. v. City of Norfolk,
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City of Ladue v. Gilleo,
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Cohen v. California,
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Dana's R.R. Supply v. Florida,
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Defense Distributed v. U.S. Dep't of State,
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Expressions Hair Design v. Schneiderman,
975 F Supp. 2d 430 (S.D.N.Y. 2013) 28

Forsyth Cty. v. Nationalist Movement,
505 U.S. 123 (1992) 12

G.K. Ltd. Travel v. City of Lake Oswego,
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H.D.V.-Greektown, LLC v. City of Detroit,
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In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig.,
827 F.3d 223 (2d Cir. 2016) 25

In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig.,
986 F. Supp. 2d 207 (E.D.N.Y. 2013) 25

Italian Colors Rest. v. Harris,
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Melrose, Inc. v. City of Pittsburgh,
613 F.3d 380 (3d Cir. 2010) 13

Neighborhood Enters., Inc. v. City of St. Louis,
644 F.3d 728 (8th Cir. 2011) 12

Norton v. City of Springfield,
806 F.3d 411 (7th Cir. 2015) 14

O'Boyle v. Town of Gulf Stream,
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Pursuing America's Greatness v. FEC,
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Reed v. Town of Gilbert,
135 S. Ct. 2218 (2015) ..... *passim*

Rowell v. Pettijohn,
816 F.3d 73 (5th Cir. 2016) 14, 19, 20, 22

Serv. Emps. Int'l Union, Local 5 v. City of Houston, 595 F.3d 588 (5th Cir. 2010) 12

Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005) 12

Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) 15

Susan B. Anthony List v. Driehaus, 814 F.3d 466 (6th Cir. 2016) 14

Texas v. Johnson, 491 U.S. 397 (1989) 8

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) 8

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) 12

United States v. Playboy Entm't Grp., 529 U.S. 803 (2000) 18

United States v. Swisher, 811 F.3d 299 (9th Cir. 2016) 14

United States v. Williams, 553 U.S. 285 (2008) 8

Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council, 425 U.S. 748 (1976) 8

Statute

15 U.S.C. §1666f(a) 10

Other Authorities

Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265 (2005) 29

Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321 (2008)..... 23, 24, 26, 29

Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv. J. Legis. 1 (2008) 21, 22, 28, 30

Alan E. Garfield, *To Swear or Not to Swear: Using Foul Language During a Supreme Court Oral Argument*, 90 Wash. U. L. Rev. 279 (2012)..... 22

Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, Vo.5, No.1 J. Econ. Perspectives 193 (1991)..... 20, 21

Daniel Kahneman, *Thinking, Fast and Slow* (2011)..... 20, 21, 22

Reserve Bank of Australia, *Payments Data*, File C3, http://bit.ly/1ZPvOVv..... 25

Samuel J. Merchant, *Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee Regulation in the Wake of Landmark Industry Changes*, 68 Okla. L. Rev. 327 (2016) ..... *passim*

Scott Schuh, Oz Shy, & Joanna Stavins, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, Fed. Reserve Bank of Boston, No. 10-03 (2010) 28, 29, 30

Spirt Airlines, *This is Spirit 101*, http://bit.ly/1XKIYV2 27

U.S. Gov't Accountability Off., GAO-10-45, Rising Interchange Fees Have Increased Costs for Merchants, but Options for Reducing Fees Pose Challenges (2009) 25, 26, 29

STATEMENT OF INTEREST[1]

Amici are some of the largest merchants in the United States, and they process millions of credit card transactions every day. They wish to provide truthful information to their customers at the point of sale about the real cost of paying by credit card. No-surcharge laws, like the one challenged in this case, prohibit them from doing so. Even though amici incur a concrete, out-of-pocket cost each time a customer pays with a credit card, ten states make it unlawful to tell customers using credit cards that they are being "surcharged" for this expense. Instead, amici and other merchants have little choice but to raise prices to all consumers in order to recover fees charged by the credit-card networks. Amici believe that New York's no-surcharge law not only offends the First Amendment, but also suppresses business, harms the economy, and disproportionately burdens low-income consumers. Amici thus have a direct and significant interest in the outcome of this case.

Ahold U.S.A., Inc. operates more than 770 supermarkets in 13 states and the District of Columbia. Its brands include Giant, Stop & Shop, and the Peapod online grocery-delivery service.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici* and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing.

Albertsons LLC and Safeway Inc. comprise the second-largest traditional food and drug retailer in the United States, operating more than 2,220 stores nationwide under 18 well-known banners, including Albertsons, Carrs, Pavilions, Randalls, Safeway, Shaw's, Star Market, Tom Thumb, and United Supermarkets.

H.E. Butt Grocery Company is one of the largest independent food retailers in the nation and the largest private company in Texas. Founded in 1905, it is the primary food retailer in south and central Texas, operating in more than 150 communities across the Lone Star State.

Hy-Vee, Inc. is an employee-owned chain of more than 240 supermarkets and drugstores. Operating in eight Midwestern states, Hy-Vee is located in Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, South Dakota, and Wisconsin. Founded as a small general store in 1930, Hy-Vee now ranks among the top 25 supermarket chains in the United States.

The Kroger Co. is the largest traditional grocer in the United States, operating in 34 states and the District of Columbia. The Kroger Co., its franchisees, and its subsidiaries operate some 3,800 stores nationwide, including more than 2,600 supermarkets and multi-department stores, 780-plus convenience stores, and 330 fine jewelry stores.

Spirit Airlines, Inc. is the leading low-cost airline in the United States, the Bahamas, the Caribbean, and Latin America. Spirit operates more than 375 daily flights to more than 50 destinations. One of the youngest-flying fleets in the industry, Spirit is ranked among Fortune's fastest-growing companies.

Walgreen Co. is the largest drug retail chain in the United States and ranks thirty-fifth among Fortune 500 companies. Walgreens serves 8 million consumers each day and operates more than 8,300 stores in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. In fiscal year 2015, Walgreens provided its customers with approximately 894 million prescriptions and immunizations.

INTRODUCTION AND SUMMARY OF ARGUMENT

No-surcharge laws such as New York's violate the First Amendment because they impose criminal penalties based on the words used to convey a particular message: namely, that credit-card transactions cost more than cash transactions. If a merchant sells a product for $103 but offers a $3 "discount" to consumers who pay with cash, nobody bats an eye. But if that same merchant sells that same product for $100 and imposes a $3 "surcharge" on consumers who pay with credit cards, it has committed a crime and could face a $500 fine and a year in prison. It is difficult to imagine a more basic violation of the First Amendment, as the legality of the speech in question turns solely on the *particular words* used to describe whether the customer is receiving a cash "discount" or being assessed a credit-card "surcharge."

The Second Circuit nonetheless held that New York's law need not be subject to *any* First Amendment scrutiny because it did not address "speech" at all, and was instead analogous to "price-control laws, which ... have never been thought to

implicate the First Amendment." Pet.App.19a. That reasoning fails at every step. Price-control laws fall outside the First Amendment because the government has authority to make certain *prices* or *transactions* unlawful—*i.e.*, if a state caps certain interest rates at 4%, a bank could not advertise a rate of 5% and then claim that this is speech protected by the First Amendment. But the New York law at issue here emphatically does not regulate prices or transactions. New York does not prohibit merchants from charging different prices to cash customers and credit-card customers, and no one disputes that a merchant could charge $103 to credit-card customers and $100 to cash customers. New York's law has nothing to do with the regulation of the actual *prices* being charged and everything to do with the *characterization* of those prices.

Once it is clear that New York's law implicates the First Amendment, the law's invalidity should be manifest. The lower courts that have invalidated state no-surcharge laws have assumed without deciding that intermediate scrutiny is the appropriate framework in which to analyze such laws, and Petitioners ably explain why New York's law flunks that test. *See* Pet.Br.36-44. To the extent the Court wishes to provide additional guidance about the relevant First Amendment principles, however, it should hold that no-surcharge laws impose content-based and, indeed, viewpoint-based restrictions on speech and thus are subject to strict scrutiny. This Court recently held in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), that a "law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive,

content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.* at 2228.

Here, the challenged New York statute, on its face, prohibits merchants from accurately characterizing as a "credit-card surcharge" a pricing structure that could lawfully, but less accurately, be labeled a "cash discount." That plainly triggers strict scrutiny under *Reed*. Those two formulations convey different messages about the nature and responsibility for the difference in cash and credit-card prices. It may be that one person's freedom fighter is another person's terrorist, but speakers who choose one formulation over the other clearly intend to convey very different messages, and a government effort to forbid labeling a particular group as freedom fighters would be the most obvious example of impermissible content and viewpoint regulation. Just so here. A discount and a surcharge convey different messages about who is responsible for the price difference and what the default price of the article really is. Forbidding reference to "credit-card surcharges" while allowing "cash discounts" is impermissible government regulation of content and viewpoint.

An extensive body of scientific research about consumer behavior confirms that state no-surcharge laws are content-based prohibitions on merchants' ability to convey a particular *message* and have real-world consequences. This research shows that the manner in which the price difference is *communicated* has a powerful impact on consumer behavior: Shoppers perceive a $1 surcharge as far

more undesirable than they perceive a $1 discount as beneficial. This central principle of human cognition, which economists call "loss aversion," explains why the credit-card industry has tolerated "discounts" but has fought tooth-and-nail to prevent merchants from imposing "surcharges." It also shows that *words* and *labels* matter to consumers, and that New York blinks reality by suggesting that its no-surcharge law is an expression-neutral means of regulating prices.

Finally, in addition to violating the First Amendment, state no-surcharge laws have a massive negative impact on the national economy. Credit card networks charge America's merchants *tens of billions of dollars* every year in "swipe fees" on consumer purchases.[2] Yet ten states, including New York, California, Texas, and Florida, prohibit merchants from passing through these fees by accurately labeling them as "surcharges" on customers who opt to use credit cards. As a result, merchants—many of which operate on razor-thin margins—have little choice but to charge higher prices to *all* consumers in order to recoup the credit networks' hefty fees. Cash-paying customers, who are disproportionately lower-income, wind up subsidizing the credit transactions—rewards programs and all—of wealthier credit-paying

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[2] Although the mechanics of a credit-card transaction are complicated, we use the term "swipe fee" or "interchange fee" to refer to the full bundle of fees imposed on the merchant and collected by various entities, including merchants' banks, the credit-card networks, and the banks issuing credit to consumers. Those fees typically amount to 1.5% to 3% of the purchase price on credit-card transactions.

consumers. Such is the economic system that no-surcharge laws perpetuate.

No-surcharge laws also create a massive market inefficiency by incentivizing far more credit-card transactions than would occur in a free market with accurate information available to consumers about the true cost of credit. Although not all states have no-surcharge laws, the four largest states do, and those laws unsurprisingly exert outsized influence on the national economy; indeed, the ten states with no-surcharge laws collectively include 40% of the country's population.

At bottom, no-surcharge laws prohibit merchants from using particular *words* to convey a particular *message* at the precise time and place where consumers would be *most receptive* to that message—namely, the point of sale. Absent reversal of the judgment below, no-surcharge laws will continue to deprive consumers of accurate information about the relative cost of payment methods, thereby skewing purchasing decisions in irrational ways, to the detriment of merchants and consumers alike.

ARGUMENT

I. No-Surcharge Laws Impose Content-Based Restrictions On Speech In Violation Of The First Amendment.

A. No-Surcharge Laws Implicate the First Amendment Because Regulation of Communication About Prices Is Regulation of Speech.

Merchant speech conveying truthful information about pricing to consumers is expression covered and

protected by the First Amendment. *See, e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council*, 425 U.S. 748 (1976). Yet the Second Circuit held in the decision below that New York's no-surcharge law falls wholly outside the ambit of the First Amendment because it merely addresses "prices" and "certain relationships between prices" and thus "does not implicate the First Amendment" at all. Pet.App.20a; *accord* Pet.App.27a (asserting that New York law merely regulates "conduct"). That reasoning—which allowed the challenged statute to evade *any* First Amendment scrutiny—badly misses the mark and rests on a misunderstanding of the New York law and an untenable interpretation of this Court's First Amendment jurisprudence.

The Second Circuit was certainly correct that the First Amendment does not "cover" all speech. For example, the First Amendment does not protect communications or statements used to commit fraud, treason, perjury, or conspiracy. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 297 (2008) (offers "to engage in illegal transactions" are "categorically excluded from First Amendment protection"). On the other hand, this Court has repeatedly recognized that nonverbal, expressive communications enjoy First Amendment coverage even if the acts in question could potentially be characterized as "conduct" rather than "speech." *See, e.g.*, *Barnes v. Glen Theatre*, 501 U.S. 560 (1991) (nude dancing); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (wearing a black armband).

The Second Circuit concluded that New York's no-surcharge law is nothing more than an economic regulation of prices that "does not implicate the First Amendment." Pet.App.18a-21a. The court's reasoning proceeded as follows: prices are not speech; therefore a prohibition on certain prices is not a regulation of speech; therefore a prohibition on certain relationships between prices is not a regulation of speech; therefore a state can regulate the relationship between a merchant's cash price and credit-card price without regulating speech protected by the First Amendment.

That syllogism breaks down, however, for the simple reason that New York's law *does not regulate the prices that merchants may charge*, but regulates instead how those prices are characterized. New York does not, and cannot, dispute that a merchant may charge $100 to its cash-paying customers and $103 to credit-card-paying customers who buy the very same product. The no-surcharge law thus has nothing to do with "prohibiting certain prices" or "prohibiting certain relationships between prices." Pet.App.20a. Instead, the sole purpose and effect of this statute is to regulate the manner in which a merchant may *characterize* or *describe* an entirely lawful price differential between cash and credit customers.

This Court's decision in *44 Liquormart* is highly instructive. In that case, Rhode Island prohibited merchants from advertising the retail price of alcoholic beverages on the theory that this prohibition would promote "temperance" by raising the price of alcohol and thereby decreasing

consumption. 517 U.S. at 504-08 (plurality op.). The Court readily acknowledged that Rhode Island could seek to achieve that objective without violating the First Amendment through "direct regulation" of alcohol prices (*i.e.*, by setting minimum prices for alcohol sales). *Id.* at 507. What Rhode Island could not do, however, was to seek to raise prices by "censor[ing] all advertisements that contain accurate and nonmisleading information about the price of the product." *Id.* at 513; *see id.* at 504 ("speech prohibitions of this type rarely survive constitutional review").

The Second Circuit purported to distinguish *44 Liquormart* on the ground that this Court's holding was limited to "the advertising of *lawful* prices." Pet.App.19a. But that is no distinction at all. New York has never disputed that it is "lawful" for a merchant to charge a higher price to credit-card customers than to cash customers.[3] The merchant's conduct becomes unlawful only if it frames its (lawful) differential pricing as a (verboten) credit-card surcharge rather than a (permissible) cash discount. Either way, this distinction has nothing to do with the legality of the *prices themselves* and everything to do with the manner in which those lawful prices are *communicated* to consumers.

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[3] Indeed, merchants' ability to engage in such differential pricing is protected by federal law. *See* 15 U.S.C. §1666f(a) (credit-card issuers "may not, by contract, or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card").

Put differently, New York takes no issue with the underlying price differential (credit cards cost more than cash), but using the wrong words to impart that message to consumers makes a merchant a criminal. As the Eleventh Circuit explained (with an apt reference to Orwell): "By effectively purging from merchants' vocabularies the doubleplusungood *surcharge* and replacing it with the State's preferred term, *discount*, the constituency most impacted by the no-surcharge law [merchants] has been deprived of its full rhetorical toolkit." *Dana's R.R. Supply v. Florida*, 807 F.3d 1235, 1247 (11th Cir. 2015).

In sum, the Second Circuit's attempt to shield New York's no-surcharge law from *any* degree of First Amendment scrutiny fundamentally misconstrues this Court's precedents and cannot be squared with the basic reality of how no-surcharge laws operate. And, for the reasons set forth below, once it is established that no-surcharge laws implicate the First Amendment, there is no remotely plausible basis on which they can be upheld.

B. New York's Criminal No-Surcharge Law Imposes a Content-Based Restriction on Speech That Merits Strict Scrutiny Under *Reed v. Town of Gilbert*.

The lower courts that have invalidated state no-surcharge laws have assumed without deciding that intermediate scrutiny is the appropriate framework for analyzing such laws, and Petitioners ably explain why New York's law fails under even that less-demanding standard of review. *See* Pet.Br.36-44. But, in reality, the no-surcharge laws are content-based—and, indeed, viewpoint-based—restrictions on

speech that are subject to (and fail) strict scrutiny, as underscored by *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

1. This Court has long differentiated between content-based and content-neutral restrictions on speech. *See, e.g., Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992). The "normal inquiry" under this Court's precedents is "first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny." *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring). A content-based regulation triggers a strict-scrutiny test, whereas a content-neutral regulation triggers intermediate scrutiny. But for many years, "[d]eciding whether a particular regulation [wa]s content based or content neutral [wa]s not always a simple task." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

A deep circuit split eventually developed about how courts should determine whether a regulation of speech was content-based or content-neutral. Three circuits adopted an "absolutist" test under which a regulation of speech was content-based if it distinguished *at all* among the content expressed, regardless of the regulation's motivating purpose. *See Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011); *Serv. Emps. Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263-66 (11th Cir. 2005). In contrast, five other circuits adopted a "practical" test, under which a regulation was content-based only if it

distinguished *because of* content, even if it facially differentiated between types of speech. *Brown v. Town of Cary*, 706 F.3d 294, 302-04 (4th Cir. 2013); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012); *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 389 (3d Cir. 2010); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 622 (6th Cir. 2009); *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1079 (9th Cir. 2006).

Two Terms ago, this Court definitively resolved this dispute in favor of the "absolutist" test. *Reed*, 135 S. Ct. at 2227-29, 2232. The Court held that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. In other words, a regulation is content-based if it "draws distinctions" based on the "communicative content" of speech, *regardless* of whether those distinctions "can be justified without reference to the content of the regulated speech." *Id.* at 2228. Thus, under *Reed*, a "law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.*[4]

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[4] In the year-and-a-half since *Reed* was decided, the decision has already had a significant impact on First Amendment jurisprudence in nearly every federal appeals court. *See Defense Distributed v. U.S. Dep't of State*, 838 F.3d 451, n.12 (5th Cir. 2016) (distinguishing precedent that "was decided before *Reed*"); *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 509 (D.C. Cir. 2016) ("*Reed* forbids us from following [our prior decision's] course here"); *O'Boyle v. Town of Gulf Stream*, No. 15-13964, 2016 WL 4056394, at *1 (11th Cir. 2016) (remanding case after

2. Applying *Reed* here, state no-surcharge laws are unquestionably not content-neutral. A no-surcharge law "prohibits the use of words to convey a particular message" and "makes the legality of a price differential turn on the language used to describe it." *Rowell v. Pettijohn*, 816 F.3d 73, 85-86 (5th Cir. 2016) (Dennis., J., dissenting); *accord Dana's R.R. Supply*, 807 F.3d at 1247 (no-surcharge statute "effectively purg[es] from merchants' vocabularies" the word "surcharge" and "replac[es] it with the State's preferred term, discount"). The no-surcharge laws are thus plainly content-based and "presumptively unconstitutional" under *Reed*. 135 S. Ct. at 2226.

Indeed, by prohibiting one characterization of the price differential (which focuses attention on the cash price and places responsibility for the excess on

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Reed reworked constitutional framework); *Bruni v. City of Pittsburgh*, 824 F.3d 353, 364 (3d Cir. 2016) ("*Reed* has altered the applicable analysis of content neutrality"); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016) (*Reed* "clarif[ied] the level of review due to certain speech prohibitions"); *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 632 (4th Cir. 2016) (the "practical" test "is no longer valid due to the Supreme Court's decision in *Reed*"); *United States v. Swisher*, 811 F.3d 299, 313 (9th Cir. 2016) (en banc) (*Reed* "provided authoritative direction for differentiating between content-neutral and content-based enactments."); *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) ("The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification."); *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (*Reed* "abrogate[s] our previous descriptions of content neutrality.").

the credit-card companies) but permitting another characterization of the same differential (which focuses attention on the credit price and places responsibility for asking for a particular payment form on the merchant), the no-surcharge laws amount to viewpoint discrimination. As with a hypothetical law prohibiting the description of a group as freedom fighters, but allowing them to be labeled terrorists, the no-surcharge laws fundamentally skew the debate and prohibit one viewpoint about the responsibility for and nature of the price differential from being expressed.

New York will inevitably argue that because its no-surcharge statute is directed at muzzling merchants, that law addresses only so-called "commercial speech" and should be evaluated under a less-demanding standard such as intermediate scrutiny or "heightened scrutiny." That argument should be rejected for several reasons. First, this Court's decision in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), applied what the Court called "heightened judicial scrutiny" to a state law restricting the disclosure of certain pharmacy records. *Id.* at 565. But *Sorrell* never held that content-based restrictions on commercial speech are less suspect than other types of content-based restrictions. It is thus a mistake to read *Sorrell* as permitting the use of something other than strict scrutiny for certain forms of content-based restrictions on speech. If anything, *Sorrell* suggests that when it comes to First Amendment doctrine, "[c]ommercial speech is no exception." *Id.* at 566.

Moreover, *Reed* itself is inconsistent with the notion that different kinds of content-based restrictions on speech may be subject to different kinds of judicial review or different tiers of scrutiny. *Reed* says nothing about favoring some content-based laws over others. Not only was the Court in *Reed* aware of *Sorrell*, but it expressly relied on that decision. If *Sorrell* meant that content-based restrictions on commercial speech were less deserving of strict scrutiny than other content-based regulations, then the Court surely would have said as much in *Reed*.[5] But the Court instead held, *without qualification*, that "content-based restrictions on speech ... can stand only if they survive strict scrutiny." *Reed*, 135 S. Ct. at 2231.

In sum, although Petitioners should easily prevail under any standard of First Amendment scrutiny, *Reed* further underscores that the no-surcharge law challenged here triggers strict scrutiny.

3. New York's criminal speech-control statute does not stand a chance under strict scrutiny. *See Dana's R.R. Supply*, 807 F.3d at 1249 (surcharging

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[5] The particular speech at issue in *Reed* was not commercial speech, but the Court's analysis of what renders a law content-based did not turn on whether the speech is commercial or non-commercial, as Justice Breyer pointed out in his concurrence in the judgment. *See* 135 S. Ct. at 2234-36 (Breyer, J.). Equally telling, both the majority and Justice Alito's concurrence emphasized the many options available to cities for constitutional sign regulation, *see id.* at 2232 (majority op.); *id.* at 2233 (Alito, J.), and neither suggested that content-based regulation of commercial signs was among the permissible options.

bans "likewise fail" when "subject to strict scrutiny"). That standard requires the Attorney General "to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231. At the outset, the government has made almost no serious effort throughout this litigation to articulate its interests with particularity, to explain why those interests are compelling, or to show how criminalizing merchant speech actually "furthers" those interests—let alone satisfies the narrow-tailoring requirement.

New York belatedly invokes three "policy rationales" in support of the no-surcharge law: preventing "unfair profiteering, consumer anger, and deceptive sales tactics." BIO.3. Assuming *arguendo*, as the Court did in *Reed*, that those nebulous interests are indeed "compelling" ones, New York cannot show that its surcharging ban "actually further[s]" its asserted interests. *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015). New York cannot simply recite interests, even if legitimate; the state must establish that its interests "would be seriously compromised" by permitting the speech in question. *Id.* at 863.

The government has not shown *how* its speech-control law prevents unfair profiteering or consumer anger. If anything, New York's law *enables* unfair profiteering by banks and credit-card companies, which can impose swipe fees that can exceed 3% of the purchase price, while merchants are prohibited from effectively communicating with their customers about those fees. And, if anything, New York's law foments—not prevents—consumer anger by forcing

merchants to raise prices across-the-board rather than passing the costs of swipe fees onto only those consumers who choose to pay with credit cards. Moreover, to the extent no-surcharge laws direct "consumer anger" over the price differential toward merchants (who may appear to be charging an artificially high price) and away from credit-card companies (who are the ones that dictate the price differential), that just underscores that the laws are impermissibly content- and viewpoint-based. Finally, if there is any "deceptive tactic" involved in the swipe-fee scheme, it is allowing the banks and credit-card companies to extract a windfall at the expense of cash-paying customers who are disproportionately poor—all the while concealing this system from consumers by preventing merchants from truthfully conveying the cost of credit.

New York also cannot show that its criminal speech-control law "is narrowly tailored" to further its interests. *Reed*, 135 S. Ct. at 2231. Strict scrutiny's narrow-tailoring requirement presents an "exceptionally demanding" hurdle that the government cannot readily surmount. *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2780 (2014); *accord United States v. Playboy Entm't Grp.*, 529 U.S. 803, 815 (2000) ("if a less restrictive means is available for the Government to achieve its goals, the Government must use it"). Seeking to prevent "consumer anger" by banning truthful speech, rather than requiring complete disclosure, is the antithesis of narrow tailoring.

II. The Specific Words Used To Communicate Prices Have A Powerful Effect On Consumer Behavior.

An extensive body of scientific research about consumer behavior further underscores that state no-surcharge laws restrict merchants' ability to convey a particular *message*. It is undisputed that New York and the other states that prohibit "surcharging" credit-card transactions nonetheless allow merchants to offer "discounts" to customers who pay with cash. As the Second Circuit noted in the decision below, New York's no-surcharge law "does not prohibit all differentials between the price ultimately charged to cash customers and the price ultimately charged to credit-card customers" because "it permits offering cash customers a discount *below* the regular price that is not also offered to credit-card customers." Pet.App.14a; *accord Rowell*, 816 F.3d at 81 ("Texas' law allows a merchant to discount and dual-price as it wishes").

One may then wonder why it makes a dime's worth of difference whether a merchant "surcharges" credit transactions or "discounts" cash transactions; either way, the merchant can charge different prices based on the method of payment in a manner that results in credit-card customers paying more than cash customers. But, although a credit-card "surcharge" and a cash "discount" may be the same as a matter of basic arithmetic, they are quite different in terms of both the messages they convey (about responsibility for the price difference and the nature of the default price) and their *effect* on consumer behavior. A robust body of scientific

research on the phenomenon of "loss aversion" shows the importance of the way in which price differences are *communicated*, and further underscores that no-surcharge laws are impermissible restrictions on the *message* that merchants are allowed to convey to their customers. *See Rowell*, 816 F.3d at 85 (Dennis, J., dissenting) (no-surcharge laws "prohibit[] the use of words to convey a particular message").

Suppose someone offers you a gamble on a coin toss: if tails, you lose $100; if heads, you win $150. Any statistician would recommend taking this highly favorable bet. Yet many people irrationally reject this bet because "the fear of losing $100 is more intense than the hope of gaining $150." Daniel Kahneman, *Thinking, Fast and Slow* 283-84 (2011). This hard-wired instinct of human cognition—known as "loss aversion"—explains why the credit industry (assisted by friendly state legislatures, *see* Pet.Br.14-16) has fought to prevent merchants from communicating that they are imposing a "surcharge," while maintaining indifference as to whether merchants provide equivalent "discounts" for cash or other non-credit transactions.

The basic premise of loss aversion is that "the disutility of giving up an object is greater tha[n] the utility associated with acquiring it." Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, Vo.5, No.1 J. Econ. Perspectives 193, 194 (1991). In other words, "changes that make things worse (losses) loom larger than improvements or gains." *Id.* at 199; *see also Thinking, Fast and Slow*, *supra*, at 282-83 (for

consumers, "the response to losses is stronger than the response to corresponding gains"). For wine lovers, research has shown that "giving up a bottle of nice wine is more painful than getting an equally good bottle is pleasurable." *Id.* at 293. And loss aversion explains why professional golfers consistently putt better when trying to avoid a bogey than when trying to make a birdie putt of equal difficulty. *Id.* at 303.

This fundamental principle of human cognition also explains why the credit industry prefers to "refer to the cash price as a discount rather than to the credit card price as a surcharge." *Anomalies*, *supra*, at 204. In the context of merchants and consumers, "[i]mposing a surcharge (which is likely to be judged a loss) is considered more unfair than eliminating a discount (a reduction of a gain)." *Id.* Because consumers are inherently loss averse, a 3% "surcharge" for a credit transaction will have a much more powerful impact on consumer behavior than an identical 3% "discount" for cash transactions. One study showed that 74% of consumers had a negative reaction to surcharges, whereas only 22% had a positive reaction to cash discounts. *Social Costs*, *supra*, at 19-20.

This Court's First Amendment jurisprudence has long recognized the importance of the *specific words* used to convey a particular message and the fact that audiences may react very differently depending on the way in which the message is conveyed. Paul Cohen's jacket would have conveyed a significantly different message if it had said "Please Oppose Military Conscription" rather than the more concise

and profane anti-draft message he actually chose. Even though both phrases convey the same substantive point, the specific words on the jacket were essential to inducing the intended effect on the audience. *See also* Alan E. Garfield, *To Swear or Not to Swear: Using Foul Language During a Supreme Court Oral Argument*, 90 Wash. U. L. Rev. 279, 280 (2012) (arguing that Cohen's attorney "won the case the moment he uttered the offending word" at oral argument). The government may not "prescribe the form or content of individual expression," and has no legitimate interest in making speech "grammatically palatable." *Cohen v. California*, 403 U.S. 15, 24-25 (1971).

Just so here. No-surcharge laws "exploit a cognitive bias that causes consumers to react differently to mathematically equivalent surcharges and discounts." *Social Costs*, *supra*, at 2. In this way, a "large chang[e] of preferences" is caused by seemingly "inconsequential variations in the wording of a choice problem." *Thinking, Fast and Slow*, *supra*, at 272.

The phenomenon of loss aversion thus confirms what this Court's First Amendment doctrine already makes clear: that state-imposed restrictions on whether merchants can "surcharge" credit transactions or "discount" cash transactions are tantamount to direct regulations on the *message* being conveyed to consumers. *See Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1207 (E.D. Cal. 2015) (no-surcharge law "regulates speech that conveys price information, which is protected by the First Amendment"); *Rowell*, 816 F.3d at 85 (Dennis,

J., dissenting) (no-surcharge laws "prohibit[] the use of words to convey a particular message").

III. No-Surcharge Laws Have A Massive And Unwarranted Impact On The National Economy.

Given that no-surcharge laws directly regulate the message that merchants can convey to their customers, it is hardly surprising that such laws have significantly skewed the incentives facing merchants and consumers alike.

A. No-Surcharge Laws Harm Merchants by Prohibiting Truthful Communications About the Cost of Credit.

Every sale between a merchant and a consumer carries some cost for the merchant—the quintessential transaction cost. A purchase for which the consumer pays with a credit card costs a merchant approximately six times as much as a cash transaction. *See* Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1321 (2008). America's merchants pay nearly $40 billion in swipe fees each year—more than three times Hollywood's total annual box-office receipts. *See id.* at 1323-24. Those fees are then used in part to fund lavish rewards programs—such as cash-back offers and airline and hotel rewards—that banks and credit-card companies use to promote the use of credit and attract high-income customers. According to one recent study, nearly *half* of credit-card interchange fees are spent on customer rewards programs. *See* Samuel J. Merchant, *Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee*

Regulation in the Wake of Landmark Industry Changes, 68 Okla. L. Rev. 327, 336-37 (2016) ("*Merchant Restraints*") (44% of interchange fees used for rewards programs).

None of this would be objectionable if customers who choose to pay with credit cards were required to bear the marginal cost of their expensive payment method. Just as online shoppers pay more for overnight shipping than for ground shipping, credit-card customers would be required to pay an additional fee to offset the high costs of processing their transactions. Yet ten states, including New York, California, Texas, and Florida, prohibit merchants from surcharging credit transactions at the point of sale. In other words, merchants in those states are prohibited from conveying truthful information to consumers about credit-card costs at the precise moment when that speech would be *most likely* to influence the consumer's decision. As a result, "consumers never internalize the costs of their choice of payment system." *Economic Costs*, *supra*, at 1324. This government-compelled asymmetry of information among credit-card companies, merchants, and consumers "results in more credit card transactions at higher prices than would occur in a perfectly efficient market." *Id.*

The Government Accountability Office conducted an extensive study of the impact of swipe fees on economic growth, and determined that—contrary to the claims of the credit industry—swipe fees are *not* offset by any increase in sales from credit-card use. *See* U.S. Gov't Accountability Off., GAO-10-45, Rising Interchange Fees Have Increased Costs for

Merchants, but Options for Reducing Fees Pose Challenges (2009). The GAO interviewed leaders from large merchants, small businesses, and merchant associations, and found that both state laws and contractual restraints imposed by credit-card companies "preclude merchants from adding surcharges for credit card payments" and, thus, from offsetting "their increased payment costs" from rising swipe fees. *Id.* at 2, 29. Those merchants were especially frustrated by their inability to impose surcharges on consumers who use rewards-program cards that carry the highest swipe fees (sometimes exceeding 3% of the purchase price). *See id.* at 15-16 (noting that "interchange fee costs for Visa's and MasterCard's premium cards have increased about 24 percent since they were introduced in 2005").[6]

In the wake of a 2013 settlement of antitrust claims, Visa and MasterCard ceased imposing *contractual* rules that prohibit surcharging. *See In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013).[7] But ten states continue to ban the imposition

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[6] This increase in swipe fees was by no means inevitable. Even as those fees were increasing sharply in the United States, they were declining in other countries that allowed surcharging. For example, the average swipe fee in Australia on American Express transactions fell from 2.48% to 1.67% after the Reserve Bank of Australia removed a ban on surcharging. *See* Reserve Bank of Australia, *Payments Data*, File C3, http://bit.ly/1ZPvOVv.

[7] The Second Circuit recently reversed the district court's approval of the settlement, *see In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig.*, 827 F.3d 223, 240 (2d Cir. 2016), but Visa and MasterCard have not taken any steps to reinstate their network-level surcharging bans and the Second

of credit-card surcharges, thereby prohibiting the truthful dissemination of cost information and preventing consumers from making fully informed decisions about whether to use credit or another form of payment. *See Merchant Restraints*, *supra*, at 378-80 (collecting state laws). As a result, consumers are forced to "choose among payment systems without factoring in point-of-sale costs." *Economic Costs*, *supra*, at 1336.

Absent reversal of the lower-court judgment, no-surcharge laws will continue to artificially (and unconstitutionally) skew the relationship between merchants and consumers. If no-surcharge laws are found unconstitutional, however, merchants would finally be given "the ability to send signals to cardholders" about which types of credit cards impose high swipe fees that drive up retail prices. *See Rising Interchange Fees*, *supra*, at 47. Protecting merchants' First Amendment right to communicate truthful information about credit-card fees would also "cause cardholders using rewards cards to be more aware of and to bear more of the cost of the rewards from which they currently benefit." *Id.* at 47-48.

Moreover, no-surcharge laws impose an especially severe burden on merchants that are committed to providing consumers with "unbundled" prices. Amicus Spirit Airlines, for instance, proudly touts on its website that its "secret" is "unbundled awesomeness"—a payment system where consumers

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Circuit's decision was based in part on the court's view that the existence of state surcharging bans limited the value of the anti-surcharging injunctive relief obtained in the settlement.

pay for *only the specific services that they actually use*. Unlike full-service legacy air carriers, a ticket for air travel on Spirit does not include the cost of "drinks, bags, outdated magazines, and even that tiny bag of peanuts." Spirit Airlines, *This is Spirit 101*, http://bit.ly/1XKIYV2 (last visited November 14, 2016). Spirit's business model is simple: "You only pay for what you want." *Id.*

But the one thing that Spirit and other amici cannot do in states with no-surcharge laws is to unbundle prices such that only card-paying customers pay for the expenses associated with credit payments. The end result is that *all* customers are compelled to subsidize the subset of customers who opt for the convenience of using a credit card rather than a less-expensive method of payment. In addition to violating the First Amendment, *see supra*, these laws are inefficient as a matter of basic economics and impose significant and unwarranted costs on the national economy.

In short, no-surcharge laws artificially skew purchasing decisions and perpetuate a massive market inefficiency. They are bad for merchants, bad for business, and bad for the economy as a whole.

B. No-Surcharge Laws Harm Consumers by Forcing Merchants To Raise Prices Across-the-Board.

No-surcharge laws also harm consumers. They "force[] the merchant into a troubling dichotomy: either accept less profit on a sale or increase prices on all products to account for the interchange fees incurred from credit-card users." *Merchant Restraints*, *supra*, at 328. "The former option harms

the merchant, while the latter harms non-credit-card users like customers paying with cash, check, or debit card[s]." *Id.* Many retailers and other merchants operate on razor-thin margins, and their only realistic option when faced with hefty swipe fees is to raise prices across-the-board for all customers, regardless of their method of payment. *See* Scott Schuh, Oz Shy, & Joanna Stavins, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, Fed. Reserve Bank of Boston, No. 10-03, at 1 (2010) (no-surcharge laws force merchants to "mark up their retail prices for all consumers by enough to recoup the merchant fees from credit card sales").

As a result, a low-income customer who buys groceries using cash or food stamps is forced to subsidize the transactions of a wealthy customer who pays with a 2%-cash-back rewards card. *See Expressions Hair Design v. Schneiderman*, 975 F Supp. 2d 430, 450 (S.D.N.Y. 2013) (Rakoff, J.) ("sellers' inability to effectively inform consumers of the true costs of credit has the effect of artificially subsidizing credit at the expense of cash"); Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv. J. Legis. 1, 1 (2008). The social costs of this system of cross-subsidization are enormous. The negative welfare effects precipitated by no-surcharge laws include "inflation, decreased consumer purchasing power because of greater debt service, lower savings rates, more consumer bankruptcies, inequitable subsidization of credit consumers by non-credit consumers, and unnecessary subsidization of the entire credit card industry." Adam J. Levitin, *The Antitrust Super*

Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit, 3 Berkeley Bus. L.J. 265, 265 (2005).

Worse still, this system is deeply regressive and disproportionately harms poor and minority consumers. According to the Government Accountability Office, consumers who do not use credit cards are "made worse off" by the bundling of the cost of payment with the cost of goods. *See Rising Interchange Fees*, *supra*, at 25. Because credit-card use correlates strongly with income, the subsidization of credit cards by cash payers entails a significant "regressive transfer of income from low-income to high-income consumers." *Who Gains and Who Loses*, *supra*, at 2. In fact, in a given year, the average cash payer transfers *over $1,200* in wealth to the average credit card payer. *Id.* at 3.

Unsurprisingly, the consumers who benefit the most from no-surcharge laws are affluent shoppers who use premium rewards cards that carry the highest swipe fees. Although merchants must accept all credit cards within a particular brand network, the swipe fees on rewards cards are significantly higher than on non-rewards cards. But rewards cards do not incentivize customers to spend more money with merchants. Rather, "rewards cards are simply shifting transactions to more expensive payment systems for merchants." *Economic Costs*, *supra*, at 1347. Because of no-surcharge laws, "[m]erchants pay the price of accepting rewards credit cards *but see no benefit from doing so*." *Id.* at 1348 (emphasis added). And "since cash users do not receive rewards" at all, the system perpetuated by

no-surcharge laws is doubly regressive. *Who Gains and Who Loses*, *supra*, at 2. Merchants, as well as consumers, would benefit greatly if merchants could truthfully communicate the costs associated with various payment systems and thereby cause consumers to internalize the true cost of their chosen payment method.

Moreover, merchants' inability to communicate truthfully about the cost of credit transactions leads consumers to use credit cards much more frequently than would occur in an efficient market with full information about the cost of credit. Because credit cards are both transacting instruments and *borrowing* instruments, the overuse of credit cards as a transacting instrument also leads to their overuse as a borrowing instrument. *Social Costs*, *supra*, at 37. Empirical research has linked no-surcharge laws to increased "credit defaults, reduced consumer savings and purchasing power, inflation, and consumer bankruptcy filings." *Id.* at 1-4.

In short, no-surcharge laws not only restrict the words merchants may use to communicate a particular message but also generate "significant effects on consumer behavior and exacerbat[e] a variety of social problems." *Id.* at 43. A prohibition on truthful speech that ultimately suppresses the purchasing power of America's poorest consumers cannot withstand any method of First Amendment review.

C. No-Surcharge Laws Allow a Minority of States To Disproportionately Affect Merchants' Communications About Pricing.

Although only ten states currently have no-surcharge laws, those laws have an outsized impact on pricing in the remaining forty states. Many merchants operate nationwide and pursue nationwide pricing strategies, making it impractical or infeasible for them to charge different prices in different jurisdictions. Although amici are able to shoulder the cost and inefficiency of employing different pricing strategies in different states, many other merchants are not. And, even for amici, the ten states that prohibit surcharging contain 40% of the country's population. Indeed, the four largest states in terms of population (California, Texas, Florida, and New York), all have no-surcharge laws. "Since most national merchants are generally located in the most populous cities in these states, these national merchants see a significant number of transactions subject to state no-surcharge prohibitions." *Merchant Restraints*, *supra*, at 354.

Given the disproportionate influence on the national marketplace of the small minority of states that have adopted no-surcharge laws, it is especially imperative for this Court to reverse the decision below and reaffirm that states have no authority whatsoever to "criminaliz[e] speech that is neither false nor misleading" about the true costs of credit-card usage. *Dana's R.R. Supply*, 807 F.3d at 1251.

CONCLUSION

The Court should reverse the judgment below.

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AND
BRIEFS

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In the Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *et al.*,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* FOR CardX, LLC IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

CardX, LLC respectfully submits this brief *amicus curiae* in support of Petitioners Expressions Hair Design, *et al.*[1]

CardX is a technology provider of credit card acceptance solutions. CardX developed the first solution that fully complies with the rules introduced by Visa, MasterCard, and Discover in 2013 to permit surcharging.[2] Using this surcharge solution, merchants provide information to customers at the point of sale about the cost of the card presented for payment, pass on the cost of credit card acceptance to cardholders, and incentivize lower-cost payment choices. Industry leaders such as Paychex and Tuition

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[1]All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2]The Visa and MasterCard rule changes were mandated by the antitrust settlement in *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013), which required the settling credit card companies to eliminate "no-surcharge" provisions from their contracts with merchants. The antitrust settlement was voided by the Second Circuit on June 30, 2016 on improper certification and inadequate representation grounds (Case No. 12-4671, Doc. 1556-1, 06/30/2016), but the latest update to the credit card companies' contracts has maintained the rules permitting surcharging. *See, e.g.*, Visa Core Rules and Visa Product and Service Rules (October 15, 2016), Section 5.6, *Surcharges, Convenience Fees, and Service Fees*, http://vi.sa/2cq3B5l at pp. 318-322.

Management Systems offer the CardX solution to the businesses and institutions they serve.

The basis of the CardX solution is a communication of the true cost of paying by credit card. "No-surcharge" laws, such as the New York statute challenged in this case, undermine the clarity and effectiveness of this solution. For this reason, CardX has a direct and significant interest in the outcome of this case.

SUMMARY OF ARGUMENT

New York law permits charging a different price for credit cards than for cash—so long as merchants contort their explanations of what they are doing in such a way as to defeat the point. "No-surcharge" laws compel merchants to frame dual pricing as a discount for cash, which draws attention away from the fact that credit card acceptance has considerable, and rising, costs.[3]

To "surcharge"—that is, to frame dual pricing as an additional fee for credit cards—is a superior tool both for communicating to customers the costs associated with their payment choices and for motivating them to choose lower-cost forms of payment. By giving a clear

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[3]"Interchange fee rates jumped 23% between 2000 and 2006 [...]." Brief for *Amici Curiae* Consumer Action, *et al.*, in support of Pet. for Writ of Certiorari, at 4-5. "[I]nterchange fee costs for Visa's and MasterCard's premium cards have increased about 24 percent since they were introduced in 2005." Brief for *Amici Curiae* Albertsons LLC, *et al.* in support of Pet. for Writ of Certiorari, at 8, citing U.S. Gov't Accountability Off., GAO-10-45, Rising Interchange Fees Have Increased Costs for Merchants, but Options for Reducing Fees Pose Challenges (2009) at 15-16.

and direct incentive to the customer to reduce the cost, surcharging does not merely transfer, but in fact lowers, total transaction costs, promoting market efficiency.

Real-world experience of surcharging attests to its desirability. Surcharging expands consumer choice and, *contra* New York's conjectures, is applied conspicuously and fairly.

ARGUMENT

NO-SURCHARGE LAWS PRECLUDE TRANSPARENT AND DIRECT SOLUTIONS TO THE PROBLEM OF TRANSACTION COSTS

The substantial costs of credit card acceptance cannot be reduced if they cannot be discussed. New York General Business Law § 518 prohibits the most natural and most effective communication of the cost of credit card acceptance: telling customers that paying by credit card is costly, and that, if they elect to use a credit card, they will bear this cost in the form of an additional fee.

To view the benefit of "dual pricing" as simply a means of transferring the merchant's burden (by passing the cost to the customer) draws the problem too narrowly. This case affects not merely the allocation of cost, but the quantity of that cost: the question is not only *who* will pay, but also *how much* will be paid.

Whether the merchant pays or the customer pays, the cost of card acceptance is a social cost, and, no matter

where the incidence lies, it is a *de facto* tax on purchases of goods and services. The tax can be reduced by making the party whose decision determines the cost bear that cost—and *know* that they are bearing that cost.

A. Consumers Are Positioned To Choose Lower-Cost Options And Apply Competitive Pressure To Card Companies.

At the point of sale, only the customer can make the choice that reduces the transaction cost, because the customer chooses what form of payment will be used. Surcharging creates efficiency for the market as a whole, because it steers customers from credit cards to debit cards (which cost significantly less to accept) as well as to cash.[4]

A lower-cost choice, motivated by surcharging, *reduces* total cost—as opposed to merely shifting it. As a real-world illustration, the typical interchange cost of a Visa Infinite credit card, which offers cardholder rewards, is 2.40% plus $0.10 per transaction. By comparison, the interchange cost of a Visa regulated debit card is 0.05% (that is, *five-hundredths of one percent*) plus $0.22 per transaction.[5] On a $1,000

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[4]The card companies' contracts with merchants dictate that no surcharge may be applied to debit cards (that is, surcharges must only be applied to credit cards). From the customer's perspective, therefore, a debit card payment can be made for the same price as a cash payment.

[5]Visa USA Interchange Reimbursement Fees, Section A (*Visa USA Consumer Check Card Exempt and Regulated Interchange*

(cont'd)

transaction, the Visa Infinite credit card will have an interchange cost of $24.10 and the Visa regulated debit card will have an interchange cost of $0.72. Steering a customer from using a Visa Infinite credit card to using a Visa regulated debit card would therefore reduce the transaction cost by at least $23.38.

Further, this "comparison shopping" among card types will apply competitive pressure to the prices charged by credit card companies, inducing them to lower their fees. Price transparency of the sort communicated by surcharging is a prerequisite for price competition.

B. Credit Card "Surcharges" Are Superior To Cash "Discounts" For Informing And Motivating Consumer Behavior.

These socially-desirable effects are blunted by the "discount" framing of dual pricing that is compelled by New York law. The well-established phenomenon of loss aversion predicts that a "surcharge" for credit is more salient than an equivalent "discount" offer for cash and debit, and therefore a surcharge serves as a superior tool for incentivizing consumers to choose lower-cost forms of payment. Brief for Petitioners at 6-7.

In addition to the far weaker behavioral effect of a perceived gain (as compared to a perceived loss), framing dual pricing as a discount for cash creates

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(cont'd)
Reimbursement Fees) and Section C (*Visa U.S.A. Consumer Credit Interchange Reimbursement Fees*) (April 16, 2016), http://vi.sa/2eS5RI7 at pp. 5-8.

confusion and talks around the point: credit card acceptance carries costs, and merchant prices must account for those costs. When the cost of credit card acceptance rises, must New York merchants tell their customers that they are raising their prices but offering even steeper cash discounts? If anything is likely to cause "consumer anger," this tortured presentation is it. *See* New York Attorney General's Brief to the Second Circuit at 9, 11 (arguing that awareness of surcharges can cause "consumer anger").

C. Prohibiting Credit Card Surcharges Limits Consumer Choice.

Without the option to transfer the cost of credit card acceptance to cardholders in a clear and direct manner, many merchants will decline to accept credit cards at all. As an example taken from CardX experience, when New York was enjoined from enforcing its no-surcharge law by the district court, a New York-based insurance company that had previously not accepted credit cards adopted the CardX surcharge solution and began offering customers the choice to pay with credit cards for the first time.[6] Numerous customers (collectively making more than $500,000 of payments per month) opted to pay with credit cards, valuing the convenience or rewards associated with their cards more than the fee they were charged.

When the Second Circuit reversed the district court on

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[6]CardX frequently contracts with merchants that, prior to adopting a surcharging solution, had declined to accept credit cards.

appeal, CardX notified the insurance company that the surcharge solution, which characterizes the price differential as an additional fee that reflects the true cost of credit card acceptance, could no longer be used. Now that it was blocked from transferring the cost of credit card acceptance to its customers in a transparent and intelligible way, the insurance company withdrew the option of paying by credit card entirely. The result was that its customers, who formerly could weigh the cost of making a credit card payment against its benefits and choose accordingly, were deprived of their revealed preference.

D. *Contra* New York's Claim, Market Conditions Prevent Exploitative Surcharging Practices.

Proponents of no-surcharge laws may look to respond to these arguments by offering the purported benefits of such bans. New York claims that "sellers can and often will use surcharges to extract windfall profits." Brief for Petitioners at 38. This conjecture found a receptive ear in Judge Livingston, author of the Second Circuit's Amended Opinion in this case:

> According to proponents of prohibitions on credit-card surcharges, experience also suggests that such surcharges will tend to exceed the amount necessary for the seller to recoup its swipe fees, meaning that sellers will effectively be able to extract windfall profits from credit-card users. *** Further, because credit-card surcharges (unlike cash discounts) offer a means of increasing

> customers' bills, dishonest sellers may attempt to profit at their customers' expense by imposing surcharges surreptitiously at the point of sale.

Expressions Hair Design, et al. v. Eric T. Schneiderman, et al., 808 F.3d 118 (2d Cir. 2015) at 6-7.

While state legislatures could craft regulation that would address these concerns without running afoul of the First Amendment (which nullifies this line of argument), such regulation would in fact be redundant with the extant rules imposed on merchants by contracts with the credit card companies. Every merchant that opts to surcharge must comply not only with state law (where applicable), but also with the contractual restraints required by Visa, MasterCard, and Discover as a condition of accepting their cards.

This contractual regime requires conspicuous disclosure of the surcharge and mandates that the surcharge must be no greater than what the merchant pays its provider to accept credit cards.[7] These rules

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[7] *See, e.g.*, Rule 5.6.1.5 *US Credit Card Surcharge Disclosure Requirements - US Region and US Territories*, Visa Core Rules and Visa Product and Service Rules (October 15, 2016):

> A Merchant in the US Region or a US Territory must, at both the point of entry into the Merchant Outlet and the Point-of-Transaction, clearly and prominently disclose any US Credit Card Surcharge that will be assessed.

(cont'd)

directly address Judge Livingston's concerns: merchants cannot profit from the surcharge, and customers are provided ample notice. From its experience as a major provider of a surcharge solution, CardX has observed that the credit card companies vigorously enforce these rules.

CONCLUSION

New York General Business Law § 518 imposes an artificial framing on dual pricing that obscures its objectives and diminishes its benefits. This restriction of speech only serves to give cover to the high costs of credit card acceptance. "No-surcharge" laws advance no cognizable public interest and contradict the well-established principles of the First Amendment: merchants have a right to truthfully explain their practices, and consumers have a "reciprocal right" to hear this information so that they may act on that truth. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

(cont'd)

> The disclosure at the Point-of-Transaction must include all of the following:
>
> - The exact amount or percentage of the US Credit Card Surcharge
>
> * * *
>
> - A statement that the US Credit Card Surcharge amount is not greater than the applicable Merchant Discount Rate for Visa Credit Card Transactions at the Merchant

http://vi.sa/2cq3B5l at p. 321.

The judgment of the Second Circuit Court of Appeals should be reversed.

DATED: November 21, 2016

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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM, and DAVID ROSS.,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; KENNETH P. THOMPSON, in his official capacity as District Attorney of Kings County.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

New York, like all states, allows merchants to charge higher prices to consumers who pay with a credit card instead of cash. But New York's no-surcharge law, N.Y. Gen. Bus. Law § 518, requires merchants to label that price difference as a cash "discount" and makes it a crime—punishable by up to one year in jail—to label it as a credit-card "surcharge." The question presented is whether New York's no-surcharge law unconstitutionally restricts speech.

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Florida Bar v. Went For It, Inc.,
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Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173 (1999) 11, 12

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People v. Fulvio,
517 N.Y.S.2d 1008 (Crim. Ct. 1987) 8

Reed v. Town of Gilbert,
135 S. Ct. 2218 (2015) 11

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487 U.S. 781 (1988) 12

Sorrell v. IMS Health Inc.,
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Thompson v. W. States Med. Ctr.,
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United States v. Stevens,
130 S. Ct. 1577 (2010) 10-11

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) 6, 12

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 10

Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626 (1985) 12

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N.Y. Gen. Bus. Law § 518 ..... *passim*

Pub. L. No. 94-222, 90 Stat. 197 7

Other Authorities

Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*,
45 Harv. J. on Legis. 1 (2008) 9

Cash Discount Act, 1981: Hearings on S. 414 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, & Urban Affairs, 97th Cong., 1st Sess. 10 (Feb. 18, 1981) ... 7

Diana Thomas, *Regressive Effects of Regulation*,
Mercatus Center George Mason U. (Nov. 2012),
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Edmund W. Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217 (1990) 6

Gordon Tullock, *The Welfare Costs of Tariffs, Monopoly, and Theft*, 5 W. Econ. J. 224 (1967).. 3, 4

Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagnation, and Social Rigidities* (1985) 3

Note, *Dissent, Corporate Cartels, and the Commercial Speech Doctrine*, 120 Harv. L. Rev. 1892 (2007) 12

Renee Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 Harv. J.L. & Pub. Pol'y 37 (2012) 5

Scott Schuh, Oz Shy & Joanna Stavins, *Who Gains and Who Loses from Credit Card Payments?*, Fed. Reserve Bank of Boston, Public Policy Discussion Paper No. 10-03 (2010) 10

The Federalist No. 10 (James Madison) (Clinton Rossiter ed., 1961) 4, 5

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Pacific Legal Foundation (PLF) is a public interest legal foundation established in 1973 to litigate cases that advance the principles of limited government and economic freedom. Towards these ends, PLF has participated as *amicus* in many cases involving the speech rights of businesses and entrepreneurs. PLF attorneys have also published extensively on the need for full First Amendment protection for commercial speech.

This case concerns *amici* because it involves the freedom of speech of both retailers and consumers.

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[1] Rule 37 statement: All parties received timely notice of *amici*'s intent to file this brief; their consent letters have been lodged with the Clerk. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The greatest trick the devil ever pulled was convincing the world he did not exist." The Usual Suspects (MGM Entertainment 1995). This movie line sums up how credit-card companies—here through the New York legislature—are insulating themselves from consumer knowledge about the "swipe fees" they charge merchants. *See* N.Y. Gen. Bus. Law § 518. While Visa and MasterCard are certainly not the devil, they have lobbied legislatures to compel business owners to speak in certain ways about how they price goods—essentially shielding themselves from market-forces at the expense of individual rights—and leading to regressive economic effects on poor and minority consumers.

The Framers drafted the Constitution in part to prevent such special-interest legislation. Indeed, the idea of such factions affecting the public interest was addressed by James Madison in Federalist 10. While Madison conceded that such interests could not be erased, he acknowledged that certain steps could be taken to mitigate the effects of these groups, and the damage that they can do.

As part of the Bill of Rights, the First Amendment also protects against such special-interest legislation. The right of the people to speak is protected by the fullest extent of judicial review—even if the speech is about matters of economic concern. When New York passed a law restricting how merchants were to speak—at the direction of the credit-card lobby—it abridged merchants' right to convey their pricing schemes, as well as the public's right to know about them.

ARGUMENT

I. CREDIT CARD COMPANIES AND STATE LEGISLATURES COLLUDED TO VIOLATE FIRST AMENDMENT RIGHTS, TO THE DETRIMENT OF POORER CITIZENS

A. The Framers Sought to Protect Citizens from the Type of Cronyism the New York Statute Manifests

At the heart of this case is the practice known as "cronyism:" a system that has been broadly described as interest groups' seeking favors from government. *See* Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagnation, and Social Rigidities* (1985). Cronyism is a form of corporatism, "a system where businesses are privately owned, but there is a comprehensive inter-tangling of government and private industry, such that the success of various firms or industries is closely tied to government and government frequently uses private industry to directly or indirectly accomplished preferred political goals." Todd J. Zywicki, *Rent-Seeking, Crony Capitalism, and the Crony Constitution*, 23 Sup. Ct. Econ. Rev. 77, 78 (2015).

No matter what label you give this practice, one of the main methods for carrying it out involves rent-seeking—where interest groups spend resources pursuing favorable legislation and regulation rather than competing in the marketplace. *See id*; *see also*, Gordon Tullock, *The Welfare Costs of Tariffs, Monopoly, and Theft*, 5 Western Econ J 224 (1967). Rent-seeking—as pervasive as it is—is not a modern phenomenon. Indeed, the Framers recognized the problem of regulatory capture at the hands of private interests—known to them as the problem of "fac-

tions"—as one of the main evils to be guarded against. Indeed, neutralizing this hazard was a major consideration in drafting a constitution that protects individual liberty. *See id.* James Madison described factions as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens or to the permanent and aggregate interests of the community." The Federalist No. 10, at 77-78 (Madison) (Clinton Rossiter ed., 1961).

Madison, when acknowledging the problem of factions, however, recognized that there was no satisfactory way to completely cure the problem:

> There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects. There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests. It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. *But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.* The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at lib-

> erty to exercise it, different opinions will be formed.

Id. (emphasis added). Madison and his colleagues sought to combat these evils by "controlling the effects" of what factions can do through a number of protections built into the Constitution. *See id.*; *see also*, Zywicki, *supra*, at 79 ("The Framers' obsession with the concern that factions might divert the government to the advancement of their own interests, rather than the public interest, is reflected in their elaborate system of separation of powers, checks and balances, federalism, enumerated powers, and even the Bill of Rights itself.") (citations omitted).

Moreover, the Framers were well aware that factions would seek to control the economic rights of citizens through majoritarian bullying or backroom deals. *See* Renee Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 Harv. J.L. & Pub. Pol'y 37, 39-46 (2012) ("The Framers designed the Constitution to further certain core principles of Enlightenment economic thought: protecting private property, enforcing contracts, preventing monopolies, and encouraging free trade among states and nations. In some clauses these principles are explicit. In others, the Framers allocated powers and arranged procedures to further these principles indirectly.") (citations omitted).

The First Amendment's protection of the people's ability to speak free from governmental interference as to economic matters fits directly into this mold. Indeed, the Court has recognized time and again the importance of protecting economic speech from majoritarian control. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Carey v. Population Servs. Int'l*,

431 U.S. 678 (1977); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 764–65 (1976) ("Though inextricably linked to underlying economic conduct, commercial speech has long been given First Amendment protection based on society's strong interest in the free flow of commercial information, which is an 'indispensable' prerequisite for creating the 'intelligent and well informed' consumers needed to 'preserve a predominantly free enterprise economy.'") (citations omitted).

B. New York's Legislature Was Lobbied by the Credit-Card "Faction" to Insulate These Companies from Consumer Knowledge

In circumvention of the Framers' design, the New York legislature passed a law that directly abridges the freedom of business owners to convey their prices. *See* N.Y. Gen. Bus. Law § 518. The credit-card companies' lobbying effort, however, did not begin in Albany. Indeed, there is a long history of this industry's attempts to insulate "swipe fees" from consumer knowledge. Before any such laws were passed, these companies included contractual clauses forbidding merchants from charging different prices when a consumer used a credit card as opposed to cash. *See* Edmund W. Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217, 219-20 & n.4 (1990). This practice was addressed by Congress in a 1974 amendment to the Truth in Lending Act (TILA). *See* Fair Credit Billing Act, Pub. L. No. 93-495, tit. III, § 306, 88 Stat. 1500, 1515 (1974) (codified at 15 U.S.C. § 1666f(a)) ("[A] card issuer may not, by contract or otherwise, prohibit any . . . seller from

offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card.").

With the foreclosure of the credit card companies' ability to insulate their profits from consumer knowledge through private contract, they diverted their efforts to masking their costs by regulating how businesses could communicate their pricing. Congress was happy to oblige. In legislation that mirrors New York's Section 518, Congress passed another amendment to the TILA in 1976. This amendment temporarily banned "surcharges," on the use of credit cards, despite the authorization for "discounts." Pub. L. No. 94-222, 90 Stat. 197. From the outset, however, many—including government officials and consumer-advocacy groups—saw the legislation as a semantic distinction without a difference. *See Cash Discount Act, 1981: Hearings on S. 414 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, & Urban Affairs*, 97th Cong., 1st Sess. 10, at 97 (Feb. 18, 1981) (testimony of Ellen Broadman for Consumers Union). ("[The] ban constitutes special interest legislation that serves the interest of only one special interest group, the credit card industry.") And "[n]ot only that, but it serves this one special interest group at the expense of the American public, to the tune of billions of dollars each year." *Id.* "The surcharge ban is special interest legislation advocated by groups who push the overutilization of credit cards." *Id.* at 91 (testimony of Jim Boyle for Consumer Federation of America). By 1984, lobbying efforts to hide swipe fees wore thin, and Congress let the 1976 amendment lapse.

Not to be deterred, the credit-card faction turned to the states, and was successful in 10 states. Indeed,

N.Y. Gen. Bus. Law § 518 was modeled after the 1976 amendment to the TILA. See *Expressions Hair Design v. Schneiderman*, 975 F. Supp.2d 430, 439 (S.D.N.Y. 2013) ("New York's no-surcharge provision . . . copied the operative text of the then-lapsed federal provision prohibiting surcharges, but did not include the federal definitions, or any other definitions, of 'discount,' 'surcharge,' or 'regular price.'").[2]

The district court, when drawing that conclusion, relied on a previous case in a state trial court that dealt with the law's constitutionality. *See People v. Fulvio*, 517 N.Y.S.2d 1008 (Crim. Ct. 1987). In *Fulvio*, the court found—based on plain statutory text and the federal legislative history—"that precisely the same conduct by an individual may be treated either as a criminal offense or as lawfully permissible behavior depending only upon the *label* the individual affixes to his economic behavior, without substantive difference." *Id.* at 1011 (emphasis in original). The court pointed out that:

> The memorandum in support of Assembly Bill 10189 (S 836) of 1984 which enacted General Business Law § 518 notes that its purpose was to fill the gap created by the expiration of the Federal ban on surcharges on credit card users and that the provision permitting a merchant to offer a discount for cash would still be permitted.

Id. at 1012.

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[2] As the district court observed, at the time the credit-card companies began their state lobbying efforts, they also began inserting no-surcharge clauses in their merchant agreements. But in January 2013, the two biggest companies, Visa and MasterCard, dropped these contractual restrictions to settle an antitrust action. *See Expressions Hair Design*, 975 F. Supp.2d at 439.

New York's legislature thus instituted the same unconstitutional labeling requirements that the card companies lobbied for at the federal level.

C. By Suppressing Speech, New York's Law Creates a Regressive Subsidy from Lower-Income to Higher-Income Consumers

As often happens when legislatures pass regulations that favor corporate factions, there are secondary regressive effects that disproportionately hurt the poor. *See* Diana Thomas, *Regressive Effects of Regulation*, Mercatus Center George Mason U., 20-22 (Nov. 2012),https://www.mercatus.org/system/files/RegressiveEffects_Thomas_v1-0.pdf (noting that regulatory burdens often represent preferences of the wealthy, driving up prices for all—regressively costing as much as six to eight times as much for low-income households compared to higher-income households).

N.Y. Gen. Bus. Law § 518 unconstitutional labeling requirement is no exception. Indeed, the labeling restriction on surcharges prevents retailers from effectively relaying to consumers the price differences between cash and credit. This, in turn, leads to retailers charging a higher baseline price for both cash and credit users—affecting a regressive subsidy from the customer who uses cash to those that use credit. Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv. J. on Legis. 1, 35-36 (2008) ("[a]s a social matter, the subsidization of credit consumers by cash consumers caused by no-surcharge rules is highly regressive... only about 40% of the lowest quintile of Americans in terms of income have a credit card. Thus, the poorest Americans tend to be cash-only consumers.").

This regressive subsidy on poor and minority consumers should not be understated. The ban on surcharge labeling significantly places the burden of the regulatory cost squarely on the poor. *See* Scott Schuh, Oz Shy & Joanna Stavins, *Who Gains and Who Loses from Credit Card Payments?* at 21, Fed. Reserve Bank of Boston, Public Policy Discussion Paper No. 10-03, (2010) ("The average cash-paying household transfers $149 . . . annually to card users," each of whom on average "receives a subsidy of $1,333 . . . annually from cash users.").

Thus, no-surcharge laws are not only unconstitutional restrictions on the words and labels merchants communicate their consumers, but they also have real world regressive effects on our poorer citizens.

II. NEW YORK'S LAW SUPPRESSES SPEECH BASED ON ITS CONTENT AND SO FAILS ANY FORM OF HEIGHTENED SCRUTINY

This case presents the opportunity to confirm that the First Amendment provides the same protection to commercial speech as to any speech that has been abridged based solely on its content. If such content-based restrictions are allowed here, legislatures will continue abridging the speech of their citizens to further the economic goals of particular interests.

A. The First Amendment Protects Against Content Restrictions on Speech, Regardless Whether It Is Commercial in Nature

The First Amendment requires heightened scrutiny when government creates "a regulation of speech because of disagreement with the message it conveys." *Sorrell*, 564 U.S. at 566 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *United*

States v. Stevens, 130 S. Ct. 1577, 1584-85 (2010) ("government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") (internal citations omitted). Last term, the Court held that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Under *Reed*, a "law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.* at 2228. Further, even if the content-based restriction is not facially content-restrictive, it will be treated as content-based if it is not "justified without reference to the content of the regulated speech" *Id.* (citations omitted). This test gives bright line rules as to when speech restrictions are subject to strict scrutiny—and the test should be applied to both commercial and non-commercial speech.

As has been recognized by members of this Court, the distinction between commercial and non-commercial speech has no constitutional basis. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 377 (2002) (Thomas, J., concurring in judgment); *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring in judgment); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.); *id.* at 510–14 (opinion of Stevens, J., joined by Kennedy, Thomas, and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and concurring in judgment); *id.* at 518 (Thomas, J., concurring in part and in judgment);

Florida Bar v. Went For It, Inc., 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.). Placing truthful speech about commercial matters in a "subordinate position in the scale of First Amendment values," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), finds no support in the text of the First Amendment or in our nation's history. *See* 44 *Liquormart*, 517 U.S. at 518 (Thomas, J., concurring in part and in judgment). Indeed, precedents justifying a second-class treatment of commercial speech appeal more to the *ipse dixit* of "commonsense" than to any constitutional grounding. *See Va. State Bd.*, 425 U.S. at 771 n.24.

That there is no clear textual or historical rationale for why commercial speech is treated differently has, inevitably, produced an unstable and unworkable doctrine. *See generally,* Note, *Dissent, Corporate Cartels, and the Commercial Speech Doctrine*, 120 Harv. L. Rev. 1892 (2007). The unworkable nature of the doctrine cries out for a bright line analysis that enables lower courts to determine when legislatures have violated people's First Amendment rights. Indeed, this Court has acknowledged on several occasions that the definition of "commercial speech" is itself confusing and vague. *See, e.g., Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 184 (1999); *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985). Furthermore, commercial speech is often, and increasingly, "inextricably intertwined" with noncommercial speech. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). The district court below noted that hybrid speech is at issue here. *Expressions Hair Design*, 975 F. Supp.2d at 446 n. 8 ("In this case, while price information no doubt proposes a transaction and re-

lates to economic interests, 'what is going on here is more than just a debate about how best to sell toothpaste.'") (quoting *BellSouth Telecomm., Inc. v. Farris*, 542 F.3d 499, 505 (6th Cir. 2008) (Sutton, J.)).

The Court should end this confusion and provide guidance to the lower courts that have struggled to apply the commercial-speech doctrine. It should clarify that state actions abridging speech based on its content—whether or not dollar signs are involved—will be given the highest degree of judicial scrutiny.

B. N.Y. Gen. Bus. Law § 518 Facially Regulates the Content of Retailers' Speech and Fails Any Form of Heightened Scrutiny

Gen. Bus. Law § 518 is a facial content restriction on how merchants can present their prices. It is not a mere restriction on their conduct. It cannot survive strict scrutiny, much less any other form of heightened judicial review.

The district court below, and other courts that have dealt with similar statutes, came to the same conclusion. In striking down the law, the court pointed to the fact it "plainly regulates speech" because it "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." *Expressions Hair Design*, 975 F. Supp.2d at 444. Further, the court explained the *Alice in Wonderland* dynamic:

> [I]f a vendor is willing to sell a product for $100 cash but charges $102 when the purchaser pays with a credit card, the vendor risks prosecution if it tells the purchaser that the vendor is adding a 2% surcharge because the credit card companies charge the vendor a

> 2% "swipe fee." But if, instead, the vendor tells the purchaser that its regular price for the product is $102, but that it is willing to give the purchaser a $2 discount if the purchaser pays cash, compliance with section 518 is achieved . . . this virtually incomprehensible distinction between what a vendor can and cannot tell its customers offends the First Amendment.

Id. at 435-436.

The Eleventh Circuit came to the same conclusion in striking down a nearly identical Florida statute as a content-based restriction, calling it a "plain old-fashioned speech suppression." *Dana's Railroad Supply v. Att'y Gen., Florida*, 807 F.3d 1235, 1247. (11th Cir. 2015). The court found that the law violates merchants' speech rights and "purg[es] from the merchants' vocabularies the doubleplusungood surcharge . . . replacing it with the State's preferred term, *discount*, the constituency most impacted by the no-surcharge law has been deprived of its full rhetorical toolkit." *Id.* (emphasis in original). Like the district court below, the Eleventh Circuit illustrated the distinction without a difference:

> After all, what is a surcharge but a negative discount? If the same copy of Plato's *Republic* can be had for $30 in cash or $32 by credit card, absent any communication from the seller, does the customer incur a $2 *surcharge* or does he receive a $2 *discount*? Questions of metaphysics aside, there is no real-world difference between the two formulations, making the law a restriction on speech, not a regulation of conduct.

Id. at 1245.

This Court should find that speech restrictions of this kind are subject to the highest form of scrutiny, and strike down the law as an unconstitutional suppression of the right to convey prices to customers.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit should be reversed.

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ECORD
AND
BRIEFS

No. 15-1391

IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *et al.*,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* CONSTITUTIONAL, ADMINISTRATIVE, CONTRACTS, AND HEALTH LAW SCHOLARS IN SUPPORT OF RESPONDENTS

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J.L. Austin, *How to Do Things with Words* (2d ed. 1975) 5

Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 Yale L.J. 2032 (2012) 5, 27

Black's Law Dictionary (10th ed. 2014) 10

Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1352 (2008) 23

James H. Kim & Anthony R. Scialli, *Thalidomide: The Tragedy of Birth Defects and the Effective Treatment of Disease*, 122 Toxicological Sci. 1 (2011) 28

Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981 (2016) 6

Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. Pa. J. Const. L. 539 (2012) 15

Merriam-Webster's Collegiate Dictionary (11th ed. 2003) 10

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STATEMENT OF INTEREST

Amici are scholars specializing in constitutional, administrative, contracts, and health law. They submit this brief to underscore the significant departure from precedent urged by petitioners, and to alert the Court to the potential widespread consequences for these respective bodies of law that would follow from acceptance of their theory that heightened First Amendment scrutiny must be applied to the routine regulation of nonexpressive economic activity.[1] A list of the individual scholars is set out in the Appendix.

SUMMARY OF ARGUMENT

"Virtually everything humans do requires the use of language." Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165, 179 (2015). If taken to its logical conclusion, the broad view of "speech" advanced by petitioners threatens to subject to heightened First Amendment scrutiny vast swaths of well-established law—from contracts, to antitrust, to anti-discrimination, to health and safety regulations. The consequences of accepting the petitioners' recasting of regulated conduct as regulated speech would be profound, and could drastically impede the ability of democratic self-government to operate.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than Amici Curiae and their counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

1. The New York law regulates a merchant's act of setting a price by requiring any charge imposed for credit card use to be included in the stated price. While the act of price setting can only be implemented through words, the regulation of such nonexpressive conduct actualized through speech has never been subject to heightened First Amendment scrutiny. Nothing in the New York law burdens a merchant's constitutionally protected expression. Merchants remain free to disclose that a price includes a cost imposed by banks for credit card use; they may also state a separate price for cash and credit. What they may not do is set a single price that does not include a credit-card fee and then charge a card fee at the register. This is a regulation of nonexpressive economic conduct that nudges some consumers to use credit, and the Second Circuit correctly applied rational basis review.

2. If petitioners' reframing of New York's surcharge as speech were appropriate, the speech they describe is essentially a consumer protection obligation, requiring that a stated price include any cost for credit to avoid consumer confusion. Consumer protection regulations mandating true factual disclosures are subject only to rational basis review under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), not heightened scrutiny under *Central Hudson v. Public Service Commission of New York*, 447 U.S. 557 (1980). In the alternative, because the New York law is aimed at commercial conduct, not commercial speech, any incidental impact on expression would still be subject to review under the less stringent standard

articulated in *United States v. O'Brien*, 391 U.S. 367 (1968).

3. Accepting petitioners' novel approach that any law regulating economic policy should be subject to scrutiny under *Central Hudson* would have far-reaching consequences, jeopardizing long-standing health, safety, and consumer protection laws that target conduct, but whose scope and application turn on how products or services are described. Such a course could open the floodgates to litigation, asking courts to apply heightened First Amendment scrutiny to well-established regulatory regimes. It would threaten a "retur[n] to the bygone era of *Lochner v. New York*, 198 U.S. 45 (1905), in which it was common practice for this Court to strike down economic regulations adopted by the State based on [its] own notions of the most appropriate means for the State to implement its considered policies." *Central Hudson*, 447 U.S. at 589 (Rehnquist, J., dissenting).

ARGUMENT

I.

NEW YORK'S SURCHARGE BAN IS SUBJECT ONLY TO RATIONAL BASIS REVIEW

A. Laws Regulating Nonexpressive Commercial Conduct Are Not Subject to Heightened Scrutiny

This Court has consistently made a clear-eyed distinction between regulations aimed at commercial conduct and regulations aimed at commercial speech.

Only the latter are subject to heightened scrutiny under *Central Hudson*, a distinction overlooked by petitioners and their amici.

1. First Amendment scrutiny does not apply to the regulation of nonexpressive conduct.

It is axiomatic that laws regulating nonexpressive conduct are not subject to First Amendment scrutiny. As the Court observed in *Sorrell v. IMS Health Inc.*, "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." 564 U.S. 552, 567 (2011). A regulation of conduct can, of course, become subject to a degree of First Amendment scrutiny if the regulated conduct itself is expressive. *E.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566 (1991) (limiting nudity for dancers at adult bookstores subject to First Amendment scrutiny); *Texas v. Johnson*, 491 U.S. 397, 403 (1989) (regulation prohibiting flag burning subject to First Amendment scrutiny); *O'Brien*, 391 U.S. at 376 (same for draft card burning).

Conversely, a regulation of conduct does not become subject to First Amendment scrutiny "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *see also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972) (holding that speech used as an "integral part" of prohibited conduct is not subject to First Amendment protection); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 439 (1911) (holding

that words used as "verbal acts" are subject to injunction).

Nonexpressive conduct can take the form of speech, referred to as "speech acts," or "performative utterances." J.L. Austin, *How to Do Things with Words* (2d ed. 1975); *see also Twin City Fire Ins. Co. v. Cty. Mut. Ins. Co.*, 23 F.3d 1175, 1182 (7th Cir. 1994) (defining "performative utterance"). Such speech consists of words that, in context, *do* something. Austin, *supra*, at 4-5. For example, in a marriage ceremony the phrase "I do take this woman to be my lawful wedded wife," or, in a will "I bequeath this watch to my brother," are words that become legally operative in context. *Id.* at 5-7. Likewise, offers, acceptances, and agreements—including criminal agreements—are speech acts, the terms of which are subject to regulation without First Amendment scrutiny. *See Twin City Fire*, 23 F.3d at 1182. The regulation of such speech acts may even require the use of specific words and phrases.[2]

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[2] The Uniform Commercial Code (UCC), for example, requires contracting parties to use very specific expressions to alter certain default rules. *See* Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 Yale L.J. 2032, 2037 (2012). To "exclude or modify the implied warranty of merchantability" in a contract for the sale of goods, the contract must either use the word "merchantability" or expressly state words to the effect that "[t]here are no warranties which extend beyond the description [of the good] on the face hereon." UCC § 2-316(2) (Unif. Law Comm'n 1977). Other legal instruments similarly require the use of specific language or roughly similar statements. *See* 28 U.S.C. § 1746 (1976) (setting forth exact phrasing necessary to effectuate oaths aside from those to appointed offices).

Such performative speech is different from expressive speech in the eyes of the law, and its regulation is not subject to First Amendment scrutiny. For example,

> agreements have long been seen as a regulable communication: "the very plot is an act in itself." . . . A statute might, for instance, require various disclosure obligations for certain kinds of agreements, and impose civil penalties . . . when those obligations aren't complied with. *That is a constitutionally valid regulation of the agreement, even though the burden on speech*—you can't say "I promise to X" unless you also say something else—*is quite deliberate.*

Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1008 (2016) (emphases added). Myriad regulations of performative speech exist that have never been subjected to heightened First Amendment scrutiny.[3]

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[3] *Ohralik v. Ohio State Bar Association* provides numerous examples of speech exempt from First Amendment scrutiny from "corporate proxy statements" to "the exchange of information about securities." 436 U.S. 447, 456 (1978). In *Sorrell*, Justice Breyer gave still further examples of laws involving speech that did not run afoul of the First Amendment. 564 U.S. at 589 (Breyer, J., dissenting).

This same principle applies to speech integral to prohibited commercial conduct. For example, because Congress has banned racial discrimination in the workplace, an employer can be required to "take down a sign reading 'White Applicants Only'" without any need for that restriction to "be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006); *see also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-619 (1969) (barring employer threats of retaliation for labor organizing activities); *Giboney*, 336 U.S. at 502-504 (barring picketing to force company to violate law); *accord Ohralik*, 436 U.S. at 455-456 (upholding regulation of attorney solicitations); *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 387-389 (1973) (upholding ban on publication of gender discriminating want ads); *Pickup v. Brown*, 740 F. 3d 1208, 1229-1231 (9th Cir. 2014) (upholding prohibition on mental health providers from using sexual orientation change therapy with minors notwithstanding that counseling was conducted via words), *cert. denied* 134 S. Ct. 2871 (2014).

Speech that does no more than actuate nonexpressive commercial conduct or is integral to prohibited conduct is not subject to First Amendment scrutiny.

2. The regulation of prices is a regulation of commercial *conduct*, even though prices are conveyed through words.

This same distinction applies to pricing regulations. States have long regulated prices set by a merchant. Legislatures may directly set prices, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion); set minimum prices, *see id.* at 530 (O'Connor, J., concurring); and set maximum prices, *Munn v. Illinois*, 94 U.S. 113, 125 (1877). Likewise, regulations and common-law rules requiring merchants to meet certain conditions before altering a set price have always been recognized as regulations of economic activity, not speech.

For example, SEC Rules 14e-1(a) and (b) require that tender offers remain open for at least twenty business days, and that an offeror may not change the percentage of securities sought or the consideration offered without extending the offer for at least ten business days from the date of the amendment. 17 C.F.R. § 240.14e-1(a)-(b) (2008). Similarly, most courts agree that under the common law of contracts, offerors may not materially alter or revoke unilateral offers once an offeree has partially accepted the offer or relied to their detriment thereon. *See* 1 Williston on Contracts § 5:13 (4th ed. 2015) ("Williston"); Restatement (Second) of Contracts § 90 (Am. Law Int. 1981) ("Restatement"). Such rules governing pricing behavior regulate commercial conduct, notwithstanding that some speech is integral to that conduct.

The evolution of the commercial speech doctrine has not altered this distinction. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, this Court held that a legislature cannot wholly prohibit merchants from communicating "[t]he 'idea'" that "I will sell you . . . X . . . at . . . Y price," without the law passing heightened judicial scrutiny. 425 U.S. 748, 761 (1976). But a law prohibiting the *communication* of a set price, as did the law at issue in *Virginia Pharmacy*, is distinct from a law directly regulating the *setting* of a price. The former is a regulation of commercial speech, while the latter is a regulation of commercial conduct.

Virginia Pharmacy did not erase this distinction, nor did it limit a state's ability to regulate speech proposing an illegal transaction. *See United States v. Williams*, 553 U.S. 285, 297 (2008) (upholding criminalization of solicitation of child pornography). Such speech may be regulated without heightened scrutiny, even when that prohibits the communication of a price. *E.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 611-612 (2003) (upholding punishment of fraudulent fundraising); *Nat'l Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 697 (1978) (upholding an injunction barring competitors from discussing prices).

As this Court reaffirmed in *Ohralik*, a state does not lose its power to regulate commercial activity the legislature deems "harmful to the public" simply because speech is a component of that activity, and "neither *Virginia Pharmacy* nor *Bates*

[*v. State Bar of Arizona*, 433 U.S. 350 (1977)], purported to cast doubt on the permissibility of [this kind] of commercial regulation." 436 U.S. at 456. To the contrary, "an expansive interpretation" of the First Amendment as applying to speech integral to prohibited conduct "would make it practically impossible ever to enforce laws against agreements in restraint of trade." *Giboney*, 336 U.S. at 502.

B. New York's Surcharge Ban Regulates Nonexpressive Commercial Conduct And Is Not Subject To Heightened Scrutiny

Petitioners describe New York's surcharge ban as restricting "only what merchants may say about their prices, not what they may charge." Resp. Br. 26. This description misconstrues both the language of the law and its impact on merchant behavior.

1. The plain terms of § 518 regulate only a merchant's conduct.

On its face, New York's surcharge ban directly regulates only what merchants may do, not what they may say. It specifies that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. The plain meaning of "surcharge" is "an additional tax, cost, or impost," *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003), or "[a]n additional . . . charge," *Black's Law Dictionary* (10th ed. 2014). In context, the Second Circuit properly concluded that an "additional charge," must mean a charge in addition to the "usual," "normal," or "regular price" "that serves as a

baseline for determining whether credit-card customers are charged an 'additional' amount that cash customers are not." Pet. App. 13-14a.

The plain language of § 518 thus prohibits merchants from setting a price and subsequently imposing any additional charge above that price when a customer pays by credit card. Setting a price is conduct, not speech.

2. Even as applied, § 518 does not burden expressive speech.

Because § 518 regulates only the *act* of imposing a surcharge, it is not subject to First Amendment scrutiny unless it indirectly burdens protected speech or expressive conduct as applied. *See O'Brien*, 391 U.S. at 376; *Sorrell*, 564 U.S. at 567. Petitioners claim that it does, as applied to two pricing schemes. Four petitioners would like to set prices for their goods and services and separately identify the amount of a surcharge they would apply to credit-card customers only. Pet. Br. 20-21. One petitioner currently posts two prices for its services—a cash price and a credit-card price—but fears prosecution if it characterizes the difference between the two prices as a "surcharge" for credit. Pet. Br. 20.

Although the Court of Appeals abstained from deciding the issue,[4] nothing in § 518 prohibits a

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[4] Pet. App. 28-40a. For the reasons stated by respondents, the Court need not address this issue further. Resp. Br. 30.

merchant from using a dual price system, setting a separate price for credit and for cash; it simply bars the imposition of any additional charge once a price is set. New York has "disavowed any interpretation of § 518 under which . . . dual-price sellers will be prosecuted simply because their employees happen to *refer* to their pricing schemes as involving a 'surcharge.'" Pet. App. 40a; *see* Resp. Br. 28. And in the single-price application of the law addressed by the Second Circuit, § 518 is plainly a valid regulation of economic conduct.

Petitioners object that § 518 does not regulate conduct because it does not effectively prevent price discrimination between cash and credit customers. In their view, the law's only effect is to regulate what a merchant may say because a "'surcharge' and a 'discount' are just two ways of framing the same price information." Pet. Br. 1. This analysis of the law and its impact fails on inspection.

First, liability under § 518 does not turn on expression. Whether called a "negative discount," a "penalty," a "credit-card tax," or a "baloney sandwich," § 518 prohibits the *act* of imposing a credit-card swipe fee, not what it is called.

Second, § 518 does not limit expression. The statute imposes no muzzle on a seller's ability to communicate that there is a cost for credit-card usage, and expressing support for, or opposition to, the costs imposed by credit card companies. Merchants that set a single price remain free, for example, to state explicitly that the price includes a fee for credit-card charges, or even describe a portion

of its price as a credit-card "surcharge," as long as it is included in the stated price. Resp. Br. 37-39.[5]

Third, § 518 regulates behavior. Saying "my price is $102 with a $2 cash discount" or "my price is $100 with a $2 surcharge for credit," may present the same economic proposition to a consumer, but each involves different merchant conduct. In one case, the merchant sets the baseline price at $100 and in the other at $102. Setting a price has a variety of consequences for a merchant, such as how the price is advertised to consumers, how taxes are calculated, how commissions are determined for employees, etc. Setting a price is the merchant conduct regulated by § 518.

Finally, the only speech § 518 prohibits is communication that "evidence[s]" and "initiate[s]" the imposition of an illegal surcharge; but such speech integral to criminal conduct is not subject to First Amendment scrutiny. *Giboney*, 336 U.S. at 502. The limited speech prohibited by § 518 is no more subject to heightened scrutiny than the

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[5] Because liability under § 518 does not turn on expression or limit expression, petitioners' reliance on *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008), is entirely misplaced. *See* Pet. Br. 30 n.6, 34, 37, 42-44. The Kentucky statute in *BellSouth* imposed a 1.3% tax on a telecommunications service provider's gross revenues and specified that "[t]he provider shall not . . . separately state the tax on the bill to the purchaser." 542 F.3d at 501. The Kentucky law thus barred a service provider from disclosing true factual information, and it imposed liability based on the content of a service provider's commercial speech. Section 518 does neither.

prohibition of a "White Applicants Only" sign following enactment of a law prohibiting employment discrimination. *See Rumsfeld*, 547 U.S. at 62. The legislature's prohibition of a credit-card surcharge is simply not subject to First Amendment scrutiny, even though prices are conveyed in words.

Properly understood, § 518 acts as either a price-setting regulation or a regulation on the conditions for altering an offer to sell. On the one hand, § 518 can be viewed as setting the maximum price a merchant may charge at the point of sale: the stated price. Viewed differently, § 518 prohibits merchants from offering to sell a good or service at a posted price and subsequently amending the offer by imposing an additional credit-card swipe fee. Either way, § 518 regulates economic conduct, not speech, and thus stands in contrast to the regulations directly prohibiting commercial speech that this Court has subjected to heightened scrutiny. *See, e.g., Sorrell*, 564 U.S. at 572-573 (striking down ban on the sale of prescriber-identifying information to drug makers); *Central Hudson*, 447 U.S. at 571-572 (striking down ban on promotional advertising by a regulated utility); *Virginia Pharmacy*, 425 U.S. at 773 (striking down ban on displaying drug prices).[6]

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[6] This distinction between regulating conduct not speech also renders inapposite the decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), in which the Court applied First Amendment scrutiny because the "conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28. Here, the conduct triggering coverage under § 518 is not the communication of any message, but the economic conduct of setting a price.

The Second Circuit correctly subjected § 518 to rational basis review as a regulation of price-setting. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 19, 22 (2005); *Dandridge v. Williams*, 397 U.S. 471, 484-485 (1970).

II.

EVEN VIEWED AS A REGULATION OF EXPRESSIVE CONDUCT, THE SURCHARGE BAN IS NOT SUBJECT TO THE HEIGHTENED SCRUTINY SOUGHT BY PETITIONERS

To the extent that the New York pricing regulation can be viewed as implicating a merchant's commercial speech, it does so without triggering the type of heightened First Amendment scrutiny urged by petitioners.

A. Section 518 Is A Consumer Protection Regulation Subject Only To Rational Basis Review

If viewed as a regulation on speech, § 518 simply requires merchants to disclose factual information (a price that includes any credit card swipe fee) in a manner that avoids misleading consumers, just like many other consumer protection regulations. In contexts from nutritional labeling to vehicle safety ratings to truth-in-lending requirements, "the government requires private actors to 'speak' in order to give the public more information about products and services." *See* Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. Pa. J. Const. L. 539, 541 (2012)

("Government-compelled commercial speech is ubiquitous.").

If stating a price is expressive conduct, § 518 acts in this same manner. It does not *ban* communication about surcharges in the way that the law at issue in *Virginia Pharmacy* banned pharmacists from advertising their prices, but rather regulates the *manner* in which swipe fees are *presented* to ensure consumers are not confused when they engage in comparison shopping or deceived in a "bait-and-switch" scheme. *See* Resp. Br. 49. This distinction is outcome determinative because there are "material differences between disclosure requirements and outright prohibitions on speech." *Zauderer*, 471 U.S. at 650.

The primary reason this Court extended First Amendment protection to commercial speech was to increase the flow of truthful commercial information to consumers. *Id.* at 651. While commercial actors have a substantial interest in avoiding restrictions on their dissemination of truthful information, their "protected interest in *not* providing any particular factual information . . . is minimal." *Id.* Accordingly, laws mandating factual disclosures to prevent consumer deception are subject only to rational basis review. *See, e.g.*, *id.* at 651 (upholding Ohio law mandating certain disclosures in advertisements for lawyers in contingent fee cases).[7]

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[7] Indeed, many circuits have applied *Zauderer* to commercial disclosure laws that are not aimed at preventing consumer deception at all. *See, e.g.*, *American Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (en

Addressing a statute similar in many respects to § 518, the Court of Appeals for the District of Columbia Circuit held that a law requiring airlines to post the *full price* of airline tickets *including tax* instead of two prices (the base price and the tax) was a valid restriction on commercial speech that withstood a First Amendment challenge under *Zauderer*. *See Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403 (D.C. Cir 2012), *cert. denied* 133 S.Ct. 1723 (2013).[8] The Court rejected *Central Hudson* as an inappropriate standard of review because the law was directed at misleading speech *and* because it did not impose an affirmative limitation on speech since the airlines remained free to break out the price of tax as long as they also displayed the *total price* prominently. *Id.* at 413-14. The make-or-break issue was the fact that the airlines could "even call attention to taxes and fees in their advertisements" as long as they did not "call attention to them by making them more prominent than the total, final price the customer must pay." *Id.* at 414. Similarly, in *Poughkeepsie Supermarket Corp. v. Dutchess County*, the Second Circuit summarily dismissed a challenge to a local law that

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banc) (upholding a USDA country-of-origin labeling requirement for meat products); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (upholding health regulation requiring chain restaurants to post calorie-content information); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (upholding law requiring pharmacy benefit managers to make mandated financial disclosures), *cert. denied* 126 S. Ct. 2360 (2006).

[8] The law at issue in *Spirit Airlines* was distinct from § 518 in that it regulated only how prices were communicated, not how they were set.

mandated price stickers be placed on the actual items for sale and subjected the law to *Zauderer* scrutiny, not *Central Hudson*. 648 Fed. App'x 156, 157-58 (2d Cir. 2015); *see also Poughkeepsie Supermarket Corp. v. Dutchess Cty.*, 140 F. Supp. 3d 309, 313 (S.D.N.Y. 2015) (doubting whether this case "involve[d] speech at all").

Section 518 clearly passes muster as well. It does not restrict disclosure of credit-card fees, it simply requires them to be included in a single price.

B. Section 518, At Most, Incidentally Burdens Commercial Speech And Is Thus Subject To Minimal Scrutiny

Should the Court disagree, and find that § 518 burdens a merchant's commercial speech beyond imposing a mandatory consumer protection obligation, any such burden is indirect and incidental to § 518's regulation of conduct. Laws that do not facially regulate speech, but by their operation incidentally burden expression, are reviewed under the standard established in *O'Brien*, not under the enhanced scrutiny applied in *Central Hudson* for laws that directly regulate commercial speech.

Under *O'Brien*, a law does not violate the First Amendment

> if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction

> on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377; *see also Humanitarian Law Project*, 561 U.S. at 28 (clarifying that the *O'Brien* standard applies to statutes aimed at conduct as long as the regulation, as applied, is unrelated to expression).

When the government demonstrates a substantial interest and its purpose in regulating is unrelated to the suppression of free expression, the law survives review. As explained in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), the final prong of the test is very loosely applied. This Court has "not insist[ed] that there be no conceivable alternative [to the law], but only that the regulation not burden substantially more speech than is necessary to further the government's legitimate interests. . . . And the Court has been loath to second-guess the Government's judgment to that effect." *Id.* at 478 (internal citations and quotations omitted). For example, in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, Justice Kennedy, writing for the Court, explained that the merits of a content-neutral regulation is properly left to the legislative branch: "It is for Congress to decide [the Government's interests] . . . and the validity of its determination does not turn on a judge's agreement with the responsible decisionmaker concerning . . . the degree to which [the Government's] interests should be promoted." 520 U.S. 180, 193 (1997)

(Kennedy, J.) (internal citations and quotations omitted).

It also bears emphasis that the regulation in this case aims at commercial conduct that only incidentally affects commercial speech. The *O'Brien* standard for scrutinizing the impact of a regulation that incidentally burdens political speech should thus be applied in a particularly forgiving manner, because commercial speech is entitled to less protection than other protected forms of speech. *See Fox*, 492 U.S. at 477.

Section 518 easily passes the minimal scrutiny required under *O'Brien*. As explained by respondent, New York has many legitimate interests unrelated to the suppression of free expression that are advanced by the law, and any incidental restriction on speech is sufficiently tailored to satisfy *O'Brien*. Resp. Br. 44-56.

III.

ADOPTING PETITIONERS' APPROACH TO REGULATIONS AIMED AT NONEXPRESSIVE COMMERCIAL CONDUCT WOULD HAVE FAR-REACHING, ADVERSE CONSEQUENCES

Petitioners make the defensive claim that "this Court can easily strike down the no-surcharge law without expanding the category of laws subject to First Amendment scrutiny," Pet. Br. 35, but they provide no basis for distinguishing § 518 from other regulations that burden speech integral to nonexpressive economic conduct or that mandate consumer protection disclosures. Subjecting such

laws to heightened scrutiny under *Central Hudson*, as petitioners urge for § 518, would undermine long-standing legislative and agency policies controlling economic activity and open the doors to a flood of new litigation. Routine commercial regulations and garden-variety enforcement actions would be disrupted by new First Amendment claims; judges would be required to weigh the governmental interests served by innumerable laws regulating economic conduct; and, complex regulatory schemes involving consumer protection, public health, and public safety could be upended. The theory advanced by petitioners in this case is a wolf in sheep's clothing, inviting a dramatic reallocation of policymaking power from legislators to judges. *Cf. Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). It should be rejected.

A. Applying Heightened Scrutiny To The Regulation of "Speech Acts" Would Subject Entire Realms of Economic Regulation To New Judicial Scrutiny

1. Economic regulations that shape "choice architecture" would become targets of litigation.

Petitioners urge that § 518 should be subjected to heightened scrutiny because, in their view, it "demand[s] one way of framing dual pricing over another." Pet. Br. 30; *see* Br. of Scholars of Behavioral Econs. as Amici Curiae Supp. Pet. 11 ("Amici Econs. Br.") (arguing that merchants must be free to frame consumer choices). Adopting that position would expose to First Amendment challenge countless laws enacted to influence economic conduct

by regulating the context in which choices are made. "Choice architecture" loosely refers to the organization of the context in which people make decisions, based on the insight that people make choices "in an environment where many features, noticed and unnoticed, can influence their decisions." Richard Thaler et al., *Choice Architecture* (2010), https://ssrn.com/abstract=1583509; *see* Richard Thaler & Cass Sunstein, *Nudge* 3 (2008).

Research bears out the effectiveness of steering individual decisions by altering the choice architecture in which those decisions take place. For example, the institution of a cap-and-trade mechanism to control acid rain is believed to have been far more successful than a command-and-control mechanism would have been in ensuring compliance with emissions regulations, while at the same time saving hundreds of millions of dollars. Thaler & Sunstein, *supra*, at 187-188. Or, pre-paying teacher bonuses with a corresponding threat to take the bonuses back if students perform poorly generates better student outcomes than offering teachers end-of-year bonuses tied to student achievement. *See* Amici Econs. Br. 6.

Section 518 is such a regulation—one that "nudges" rather than mandates an outcome. As petitioners' and their amici acknowledge, customers are less likely to use credit cards if a "surcharge" is imposed on customers using credit rather than if a "discount" is given to customers paying by cash due to the cognitive bias known as "loss aversion." Amici Econs. Br. 4-11; *see* Thaler & Sunstein, *supra*, at 33. By requiring any credit-card fee to be included in a

merchant's single stated price, New York's law "nudges" a consumer's behavior while retaining consumer options, and it is a nudge the legislature could reasonably want to make for a number of reasons. For example:

- Prohibiting a credit sur-charge limits the ability of merchants to "pad" their swipe fees and curtails profiteering on excessive fees. Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1352 (2008).

- Promoting credit card use facilitates bookkeeping and currency conversion and decreases the merchants' theft and credit risks. *Id.* at 1342.

- Credit-card purchases leave evidentiary trails that facilitate law enforcement and assist recovery by civil plaintiffs. *See, e.g., United States v. Maturo*, 982 F.2d 57, 59 (2d Cir. 1992) (DEA subpoena for credit-card purchases in the investigation of drug smuggling).

Like § 518, the functioning of a multitude of regulations could be dissected and criticized as having no real effect other than limiting "speech," because in dictating how choices are presented they leave consumers with "economically equivalent" choices. *See* Amici Econs. Br. 11. Like § 518, these ubiquitous laws alter the "choice architecture" without limiting the discussion of any topic, idea, or expression. Yet, under petitioners' approach, these

regulations would all become subject to First Amendment scrutiny.

Take for example, mandatory opt-in/opt-out regulations. Several states have enacted laws requiring certain employers to automatically enroll employees in voluntary state-managed retirement plans and automatically deduct contributions to the plans from employees' earnings, unless the employees explicitly opt out of the plan.[9] Under these laws, employers must require employees to "opt out" and are prohibited from presenting employees the option to "opt-in," even though "opting in" and "opting out," like "surcharges" and "discounts," "are just two ways of framing the same . . . information." Pet. Br. 1. An "opt in" or "opt out" regime is actuated solely through speech: either the employer is required to ask employees whether they wish to *join* the retirement plan, or it is required to ask whether they wish to *not join* the plan.

New York's scheme is nothing other than such a government-mandated opt-out rule: Businesses must include swipe fees in their stated price but may allow consumers to opt out of paying those fees if they use cash. Allowing a surcharge for credit would be an opt-in rule. Accepting petitioners' argument, all such laws would have to be assessed by judges

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[9] *See, e.g.*, 2016 Md. Laws, Ch. 323 (S.B. 1007); 2015 Or. Laws, Ch. 557 (H.B. 2960); Illinois Secure Choice Savings Program Act, 2014 Ill. Laws, Pub. Act No. 98-1150 (S.B. 2758); California Secure Choice Retirement Savings Act, 2012 Cal. Stat., Ch. 734 (S.B. 1234). Federal law also preempts state laws that would prohibit such automatic contribution arrangements. 29 U.S.C. § 1144(e) (2006).

applying *Central Hudson*. State lawmakers and regulators would thus be subjected to substantial new burdens in regulating economic activity.

Other examples of framing regulations that could be dissected to locate an impact on speech abound. Consider, for example, prohibitions on offering discounts for harmful products. To discourage the consumption of tobacco, a city could enact an ordinance prohibiting retailers from accepting coupons or offering multi-pack discounts for tobacco products, while still permitting retailers to set their own prices. Although a discount coupon is "economically equivalent" to lowering the "sticker" price, under settled principles a city is currently permitted to prohibit discount coupons on a rational basis review as an act of economic regulation.

Indeed, the First Circuit held just this in refusing to apply First Amendment scrutiny to such a prohibition designed to curb underage smoking. *See Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 77-79 (1st Cir. 2013). As the First Circuit properly recognized, the law implicated important legislative prerogatives: the prerogative to protect the health and safety of adolescents. *See also, Nat'l Ass'n of Tobacco Outlets, Inc. v. City of New York*, 27 F.Supp.3d 415, 424 (S.D.N.Y. 2014) (applying no First Amendment scrutiny to ban on selling tobacco products below the merchant's stated price because the "offers that are restricted by the ordinance are offers to engage in an unlawful activity").

Erasing the distinction between speech integral to conduct and expressive speech could

likewise cast doubt on regulations of speech acts that have never been subject to First Amendment challenge. For example, it is hornbook law that an amount of liquidated damages in event of a breach may be specified in a contract, while a pure penalty that is contractually imposed for a breach is typically unenforceable. Williston § 65:1. The distinction between these two types of clauses is well-settled—a liquidated damages clause provides payment of "reasonable" damages for actual or estimated losses, while a penalty provides payment in excess of "reasonable" losses. Restatement § 356 cmts. a & b. In practice, however, difficulties in measuring what constitutes "losses" and what is "reasonable" often render the difference between the two semantic. *Id.*; *see also* Williston § 65:11. The same stipulated payment arising from the same course of conduct might be enforceable or not, depending upon how it is characterized.

This principle of contract law is nothing more than a judge-made nudge arising out of aversion to punitive provisions. *See* Restatement § 356 cmt. a. It too affects speech: Contracting parties may not call something a "penalty," but are permitted to call the same payment a liquidated damages clause. Petitioners' preferred rule would imply that this longstanding rule in contract law should be viewed as a constraint upon commercial speech, and is thus subject to *Central Hudson* scrutiny. Yet no one seriously considers that this black-letter principle must be subjected to *any* First Amendment scrutiny, much less the *Central Hudson* test.

Petitioners' position is broader still, reaching laws and rules that are not obviously intended to nudge. Every law, in some sense, sets a "default" that shapes the environment in which individual decision-making occurs and thereby frames decision-making. *See* Ayres, *supra*. "Choice architecture, both good and bad, is pervasive and unavoidable, and it greatly affects our decisions." Thaler & Sunstein, *supra*, at 252. Unless the Court intends to promote judicial review and assessment of the modern regulatory state, it should reject petitioners' invitation to subject framing laws shaping economic choices to heightened scrutiny whenever speech actuates or is integrally related to regulated commercial conduct.

2. Economic regulations that burden speech integral to conduct would also become targets of litigation.

If petitioners prevail, laws that burden speech that simply actuates commercial conduct could become subject to First Amendment scrutiny in many contexts. Accepting petitioners' approach to commercial regulation would raise future questions about everything from mandated contract language to employment discrimination to antitrust law. And it would produce untold collateral consequences by requiring the government to justify under *Central Hudson* how complex regulatory schemes are crafted to promote a sufficiently important interest in the "least restrictive" way. Many of the laws that may be most affected, however, ironically share the very goal that petitioners aim to promote: consumer protection.

For instance, decades of food and drug regulations could become subject to new judicial scrutiny if petitioners prevail. The FDA's regulation of the sale and marketing of drugs necessarily looks to commercial communications and vividly illustrates the stakes at issue. One of the FDA's most important powers is its ability to preclude the sale of medicines for which there is not sufficient evidence that they are "safe and effective" for the purposes of use intended by the manufacturer. 21 U.S.C. § 355. This power has protected the public for decades from events like the thalidomide disaster. That drug was intended to reduce nausea in pregnant women, and only because of the insistence of an intrepid FDA reviewer was never approved in the United States. It was approved and widely-used abroad, however, and caused thousands of birth defects and deaths because it had not been appropriately studied. *See* James H. Kim & Anthony R. Scialli, *Thalidomide: The Tragedy of Birth Defects and the Effective Treatment of Disease*, 122 Toxicological Sci. 1, 1 (2011), http://toxsci.oxfordjournals.org/content/122/1/1.full.pdf+html.

The FDA's power to ban unproven medicines from the market is a regulation of conduct—the distribution of potentially dangerous medicine—but it is triggered through speech. Whether a product is a "drug" subject to the FDA's premarket approval depends on whether the seller makes therapeutic or curative claims about the product. *Whitaker v. Thompson*, 353 F.3d 947, 953 (D.C. Cir. 2004) ("[The]

classification of a substance as a 'drug' turns on the nature of the claims advanced on its behalf.").[10]

For example, while a company is free to sell a plant extract for use as a furniture polish without permission from the FDA, if the company claims that the extract cures cancer, the FDA then has the authority to prohibit its sale until the company demonstrates with sufficient evidence that the product's benefits outweigh its risks with respect to that claimed use. *See United States v. Rutherford*, 442 U.S. 544 (1979) (holding that the FDA can prohibit the sale of a plant extract until drug company proves safety and effectiveness). Speech alone—in the form of a therapeutic claim—constitutes and defines the "conduct" of distributing a drug that is subject to the FDA's premarket approval. If this Court proceeds down the path proposed by petitioners, the FDA's regulation of the conduct of distributing an unapproved drug could soon be subject to heightened scrutiny because the FDA's power to regulate arises from what the seller *says*.

Focusing on the speech implications of any economic regulation could quickly subject the complex statutory scheme for regulating drugs to mountains of litigation seeking enhanced judicial

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[10] The very definition of a "drug" subject to regulation, and the conduct of introducing a drug into interstate commerce, are largely determined through the manufacturer's speech. 21 U.S.C. § 321(g)(1)(B) (2009) (definition of "drug" based on the product's "intended" "use"); 21 C.F.R. § 201.128 (1976) ("intended use" can be determined by claims made by the manufacturer).

scrutiny of any FDA action that incidentally burdens commercial speech. Applying the *Central Hudson* test would shift the evidentiary burden from a drug manufacturer onto the government. In this brave new world, the government would have to defend decades of regulatory practice against *Central Hudson* review, and only bar unproven medicines from the market if it could show that it had a substantial interest, and sufficient tailoring, to limit the safety or therapeutic claims being made by every distributor of a quack drug.[11] Petitioners' approach could turn back the clock to an era when unsafe and ineffective medicines could be widely sold to physicians and patients. It would also undermine our world-leading pharmaceutical industry, which relies strongly on regulation to reassure consumers of the reliability of its treatment claims.

Adopting petitioners' approach would assign to judges the power to veto countless economic regulatory decisions properly left to the political branches. But judicial "[d]oubts concerning the policy judgements" behind economic regulations "do not . . . justify reliance on the First Amendment" as a basis for reviewing them. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 476 (1997).

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[11] The notion that First Amendment law could upend drug regulation is far from fanciful. In *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012), the Second Circuit concluded that *dicta* in *Sorrell* implied the FDA's power to restrict the marketing of *approved* substances for *unapproved* uses might violate the First Amendment.

B. Even Viewing § 518 As Burdening Commercial Speech, Requiring Heightened Scrutiny Would Subject Many Regulations To Heightened Judicial Scrutiny

Even if § 518 is viewed as compelling or burdening speech, not conduct, applying *Central Hudson* scrutiny to this type of commercial speech regulation would invite new judicial review of many long-standing regulatory regimes that necessarily limit commercial communications integral to commercial conduct.

Many statutes, both at the state and federal level, regulate the manner in which commercial speech may be compelled and could be jeopardized if subjected to *Central Hudson* scrutiny—a dangerous possibility suggested by petitioners' line of reasoning. For example, the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.* (2012), as implemented by Regulation Z, 12 C.F.R. 1026 *et seq.* (2015), contains extensive requirements regarding required disclosures and prohibited language binding creditors in contexts including provision of high cost and reverse home mortgages, 12 C.F.R. § 1026.32 (2014); 12 C.F.R §1026.33 (2011), private educational loans, 12 C.F.R. § 1026.46 (2011), and open-ended and closed-ended credit, 12 C.F.R. § 1026.51 (2013); 12 C.F.R. § 1026.17 (2015). The law and implementing regulations detail the manner and timing of disclosures required regarding interest rates, finance charges, and circumstances resulting in increases in annual percentage rates. There are strict rules regarding the language that can be used

in oral disclosures. *See* 12 C.F.R. § 1026.26 (2011) (oral disclosures regarding annual percentage rate). Regulation Z contains extremely specific requirements governing consumer credit advertising, including provisions identifying terms that, if stated, require further disclosures, *id.* § 1026.16(b); and provisions prohibiting the use of certain phrases, *id.* § 1026.16(d)(5). But according to petitioners' theory, heightened First Amendment scrutiny is required if lenders must inform consumers in one way rather than another.

Federal labeling requirements for auto sales provide another example of a consumer protection disclosure law that would be subjected to heightened scrutiny under petitioner's approach. Every car manufacturer is required to label each vehicle with specific details concerning when and where it was manufactured, the method of delivery to the dealer, the manufacturer's suggested price, its safety ratings and more. *See* 15 U.S.C. § 1232 (2012).

Or consider the regulatory authority extended to the Food and Drug Administration. The FDA can require specific warning language, contained in a box at the top of a drug's label (a so-called "black box" warning), in cases where use of a drug may expose a patient to one or more particularly serious risks. 21 U.S.C. § 355 *et seq.* (2015); 21 C.F.R. § 201.57 (2015). The FDA's enabling legislation and regulations give the agency authority to both specify and limit the label language that may accompany drugs, biologics, and medical devices approved for the U.S. market. That is, the FDA can require that the facts be stated one way, even if drug manufacturers believe that

there is no difference in the descriptions. If the FDA were required to defend every labelling decision and the text of every black box warning in court, the burdens on the agency would be astronomical, and the agency's ability to engage in its congressionally mandated tasks fatally compromised.

There are "literally thousands" of regulations on the books that compel the disclosure of economically significant information, including "product labeling laws, environmental spill reporting, accident reports by common carriers, [and] SEC reporting as to corporate losses." *Pharm. Care Mgmt. Ass'n*, 429 F.3d at 316. If this Court accepts petitioners' plea to transform the New York pricing regulation into a speech restriction, thousands of routine regulations could become subject to heightened First Amendment scrutiny.

Petitioners' invitation to open the door to additional judicial oversight of the choices made by the political branches to regulate economic activity should be firmly rejected.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Dated: New Haven, CT
December 21, 2016

Respectfully submitted,

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APPENDIX

The amici are legal scholars specializing in constitutional, administrative, contract, and health law. They have substantial expertise in issues directly affected by the outcome in this case. These amici are listed below. Institutional affiliations are listed for identification purposes only.

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Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM AND DAVID ROSS,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW YORK; CYRUS R. VANCE , JR., IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF NEW YORK COUNTY; KENNETH P. THOMPSON, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF KINGS COUNTY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CONSUMER ACTION AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CITED AUTHORITIES

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Cases

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 17

Allstate Ins. Co. v. Abbott,
495 F.3d 151 (5th Cir. 2007) 18

Bates v. State Bar of Ariz.,
433 U.S. 350 (1977) 8, 19

Pearson v. Shalala,
164 F.3d 650 (D.C. Cir. 1999) 18

Texas v. Johnson,
491 U.S. 397 (1989) 17

Thompson v. W. States Med. Ctr.,
535 U.S. 357 (2002) 13

United States v. Visa U.S.A., Inc.,
163 F. Supp. 2d 322 (S.D.N.Y. 2001) 5

Va. State Bd. of Pharmacy v.
Va. Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) 17

Statutes

Minn. Stat. Ann. § 325G.051(1)(a) 20

Cited Authorities

Page

N.Y. Gen. Bus. Law § 349 19

Legislative Materials

Cash Discount Act, 1981: Hearings on S. 414 Before the Senate Banking Comm., 97th Cong., 1st Sess. 10 (Feb. 18, 1981) 19

Financial Services Issues: A Consumer's Perspective, Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Institutions, 108th Cong. 115 (2004) (statement of John J. Motley III, Sr. Vice President, Food Marketing Institute)..... 4

Other Authorities

Adam J. Levitin, *The Antitrust Superbowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berk. Bus. L. J. 265 (2005) 16

Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321 (2008) ..... *passim*

Adam J. Levitin, *Priceless? The Social Costs of No-Surcharge Rules*, Business, Economics and Regulatory Policy Working Paper Series No. 973974, 44 (Jan. 2008 Revision)..... 9, 11, 12, 13

Cited Authorities

Page

Andrew Ching & Fumiko Hayashi, Federal Reserve Bank of Kansas City, *Payment Card Rewards Programs and Consumer Payment Choice*, Working Paper No. 06-02, 4 (2006), *available at* http://www.kansascityfed.org/PUBLICAT/PSR/RWP/ching_hayashi_paper.pdf 10

Andrew Martin, *Card Fees Pit Retailers Against Banks*, N.Y. Times (Jul. 15, 2009), *available at* http://www.nytimes.com/2009/07/16/business/16fees.html 4

Antitrust: Commission prohibits MasterCards intra-EEA Multilateral Interchange Fees, Commission Européenne (Dec. 19, 2007), *available at* http://europa.eu/rapid/press-release_IP-07-1959_en.htm?locale=fr.....14

Associated Press, *Consumers Take on More Debt*, N.Y. Times (Jul. 9, 2012), *available at* http://www.nytimes.com/2012/07/10/business/credit-card-debt-climbed-by-8-million-in-may.html?_r=0 15

Burney Simpson, *Merchants Tackle Credit Card* Fee Policies, Cards & Payments (Jan. 2006) 9

Cited Authorities

Page

David S. Evans & Richard Schmalensee, Interchange Fees in Credit and Debit Card Industries, Proceedings of the 2005 Federal Reserve Bank of Kansas City Conference, *The Economics of Interchange Fees and Their Regulation: An Overview,* 96 (2005), *available at* https://www.kansascityfed.org/publicat/pscp/2005/Evans-Schmalensee.pdf 5, 12

Efraim Berkovich, *Card Rewards and Cross-Subsidization in the Gasoline and Grocery* Markets, Rev. of Network Econ. 11.4 (2012). 11

Elizabeth Warren, *Antitrust Issues in Credit Card Merchant Restraint Rules*, Tobin Project Risk Policy Working Group (May 6, 2007) 4, 9

General Court of the European Union, T-111/08, *MasterCard Inc. et al., v. Commission* (2012), *available at* http://curia.europa.eu/juris/document/document.jsf?docid=123081&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=443823 5

Irvin Molotsky, *Extension of Credit Surcharge Ban*, N.Y. Times, Feb. 29, 1984, *available at* http://www.nytimes.com/1984/02/29/business/extension-of-credit-surcharge-ban.html. 18

Joseph Farrell, *Efficiency and Competition Between Payment Instruments,* 5 Rev. Network Econ. 26, 31 (2006) 13

Cited Authorities

Page

Keith Bradsher, *U.S. Looks to Australia on Credit Card Fees*, N.Y. Times (Nov. 24, 2009), *available at* http://www.nytimes.com/2009/11/25/your-money/credit-and-debit-cards/25card.html?pagewanted=all;.....4

Marc Rysman & Julian Wright, *The Economics of Payment Cards* (Nov. 29, 2012) (Working Paper, Boston University & National University of Singapore).....20

Meg Handley, *Consumers Still Buried In Credit Card Debt*, U.S. News and World Report (Mar. 12, 2012), *available at* http://www.usnews.com/news/articles/2012/03/12/consumers-still-buried-in-credit-card-debt.....15

Meta Brown, *et al.*, Federal Reserve Bank of New York, *Do We Know What We Owe? A Comparison of Borrower- and Lender-Reported Consumer Debt* (Revised Oct. 2013), *available at* http://www.newyorkfed.org/research/staff_reports/sr523.pdf.....15

Oren Bar-Gill, *Seduction by Plastic*, 98 Nw. U. L. Rev. 1373 (2004).....15

Reserve Bank of Australia Payment Statistics, Bulletin Table C3, Average Merchant Fees for Debit, Credit and Charge Cards, http://www.rba.gov.au/statistics/tables/xls/c03hist.xls.....13

Cited Authorities

Page

Scott Schuh, *et al.*, Federal Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card* Payments? Theory and Calibrations (2010) . . 6, 10, 11

Stuart E. Weiner & Julian Wright, *Interchange Fees in Various Countries: Developments and Determinants*, 4.4 Rev. of Network Econ. 299 (2005), *available at* http://www.academia.edu/3095968/Interchange_Fees_in_Various_Countries_Developments_and_Determinants. 13

Teresa A. Sullivan, Elizabeth Warren, Jay Lawrence Westbrook *Credit Cards*, The Fragile Middle Class: Americans in Debt, Yale University Press (2000) 16

Terri Bradford & Fumiko Hayashi, Federal Reserve Bank of Kansas City Payments System Research Briefing, *Developments in Interchange Fees In the United States and Abroad* (Apr. 2008), *available at* http://www.kansascityfed.org/publicat/psr/briefings/psr-briefingApr08.pdf. 14

William C. Dunkelberg & Robert H. Smiley, *Subsidies in the Use of Revolving Credit*, 7.4 J. Money, Credit & Banking 477 (1975) 9

Zhu Wang, *Market Structure and Credit Card Pricing: What Drives the Interchange?*, 28 Int'l J. of Indus. Org. 86, 93 (2010), *available at* http://www.frbatlanta.org/news/CONFEREN/08payments/08payments_Wang.pdf . 7, 12

INTEREST OF *AMICI CURIAE*

Amici curiae are two leading consumer advocacy groups whose decades of collective experience advocating for consumers make them qualified to assist the Court in understanding the substantial public interest at issue here. Amici have broad knowledge about the history of credit cards and are particularly well qualified to assist the Court in understanding how the public interest, and consumer interests in particular, are undermined by no-surcharge laws, which were originally advanced by the credit card industry and opposed by consumer-advocacy groups.[1]

Consumer Action has been educating consumers on credit card related matters, including credit card surcharges, for more than four decades. Consumer Action has been a champion of underrepresented consumers since 1971. A national, nonprofit 501(c)(3) organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change particularly in the fields of credit, banking, housing, privacy, insurance and utilities.

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1 The parties consented to the filing of this Brief and such consents are being submitted herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices.

INTRODUCTION AND SUMMARY OF ARGUMENT

American merchants pay the highest fees on credit card transactions in the world, fees that are many times higher than the fees paid by merchants in most other developed countries. It is estimated that merchants incur upwards of $50 billion of swipe fees per year. Merchants have no choice but to pass on these credit card costs to consumers in the form of higher retail prices on the goods and services they purchase every day. The main reason that there is not more awareness and outcry about this issue is that swipe fees are hidden from consumers.

All states allow merchants to recover the cost of swipe fees, but New York and nine other states prohibit merchants from describing the price difference as a surcharge. By prohibiting merchants from informing consumers about the costs of credit card use, no-surcharge laws hinder consumers' ability to make meaningful and cost conscious decisions about payment choice. No-surcharge laws deprive merchants of a valuable tool that

could otherwise be utilized to help remedy the grossly inefficient and anticompetitive payment system.

Amici curiae are national consumer advocacy organizations that support reversal of the decision below and file this brief to make four primary points. *First*, the New York no-surcharge law results in supra-competitive interchange fees that, as a practical matter, merchants are forced to recoup by raising prices for all consumers. *Second*, the no-surcharge law results in highly regressive cross subsidies of high cost credit cards and rewards programs by other consumers—which, "[i]n the most extreme terms, . . . mean that first-class upgrades from frequent flier miles are subsidized by food stamp recipients." Elizabeth Warren, *Antitrust Issues in Credit Card Merchant Restraint Rules*, Tobin Project Risk Policy Working Group, 1 (May 6, 2007). *Third*, less restrictive means—in the form of disclosure requirements rather than speech codes—are available to protect consumers from potential merchant abuses. *Fourth*, none of the proffered justifications for the law stands up to scrutiny.

ARGUMENT

I. NO-SURCHARGE LAWS FORCE MERCHANTS TO RECOUP SUPRA-COMPETITIVE SWIPE FEES BY RAISING STICKER PRICES FOR ALL CONSUMERS.

To adequately understand the policy considerations relating to no-surcharge laws, one must first understand the merchant fees that comprise the underlying problem. Every time a consumer uses a credit card, the merchant

pays 1–4%[2] of the transaction value in "swipe fees," most of which go to the issuing bank as "interchange fees."[3] Interchange fees in America are the highest in the world, generating approximately 50 billion dollars per year for credit card issuers, with more than 200 million dollars of it from federal agencies alone.[4] Interchange fee rates jumped 23% between 2000 and 2006, and because the volume of credit card transactions also increased dramatically, the absolute cost of interchange fees for merchants increased 139% during the same period.[5] "For many merchants, credit card acceptance has become the fastest growing cost of doing business."[6]

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2 These fees are usually a hybrid of a per-transaction price and a percent of transaction cost, and sometimes can reach 15%, depending on the risk factor of the merchant. *See* Elizabeth Warren, *Antitrust Issues in Credit Card Merchant Restraint Rules*, Tobin Project Risk Policy Working Group, 1 (May 6, 2007).

3 These fees are technically divided between three banking entities, but for the purposes of this brief, the technical structure of credit card payment systems is irrelevant. *See* Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321 (2008).

4 *See, e.g.*, Keith Bradsher, *U.S. Looks to Australia on Credit Card Fees*, N.Y. Times, (Nov. 24, 2009), *available at* http://www.nytimes.com/2009/11/25/your-money/credit-and-debit-cards/25card.html?pagewanted=all; Andrew Martin, *Card Fees Pit Retailers Against Banks*, N.Y. Times (Jul. 15, 2009), *available at* http://www.nytimes.com/2009/07/16/business/16fees.html.

5 Levitin, *supra* note 3, at 1345.

6 Levitin, *supra* note 3, at 1345 (citing *Financial Services Issues: A Consumer's Perspective, Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Institutions*, 108th Cong. 115 (2004) (statement of John J. Motley III, Sr. Vice President, Food Marketing Institute)).

No-surcharge rules have helped to enable credit card use to increase despite being "more expensive on average for merchants than cash and checks,"[7] by limiting merchants' ability to pass these fees to the consumers who choose to use credit cards. By returning a small portion of the swipe fee revenues in the form of rewards to a fraction of consumers, credit card companies have constructed a system whereby consumers actively, and unknowingly, choose the most costly payment system. Increased swipe fees fuel greater rewards, which fuel greater use, in a race to the top—precisely the opposite of competitive pricing.

This potent combination of greater demand for credit card use and increasing swipe fees has forced merchants to increase retail sticker prices to all consumers to recoup their credit card costs. "[H]undreds of thousands of merchants . . . must take credit cards at any price because their customers insist on using those cards." *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 341 (S.D.N.Y. 2001) *aff'd*, 344 F.3d 229 (2d Cir. 2003).[8]

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7 David S. Evans & Richard Schmalensee, Interchange Fees in Credit and Debit Card Industries, Proceedings of the 2005 Federal Reserve Bank of Kansas City Conference, *The Economics of Interchange Fees and Their Regulation: An Overview*, 96 (2005), *available at* https://www.kansascityfed.org/publicat/pscp/2005/Evans-Schmalensee.pdf.

8 *See also United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 340-41 (S.D.N.Y. 2001) *aff'd*, 344 F.3d 229 (2d Cir. 2003)); General Court of the European Union, T-111/08, *MasterCard Inc. et al., v. Commission* (2012), 28 ("[T]he MasterCard payment organisation [sic] collectively exert market power vis-à-vis merchants and their customers."), *available at* http://curia.europa.eu/juris/document/document.jsf?docid=123081&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=443823.

Simultaneously, no-surcharge laws impede merchants' ability to communicate or allocate the cost of credit card usage to the consumers who impose the cost by choosing to pay with credit cards. To cover the costs of credit card merchant fees, merchants are forced to raise the unified sticker prices for all their goods. Cash buyers pay higher retail prices than they otherwise should, while credit card customers are discounted from the true cost of their transaction. Credit card consumers receive all the benefits of credit card use, while cash customers receive no benefit and pay a premium to cover the difference—a pervasive cross-subsidy operating on all transactions. As Elizabeth Warren has put it: No-surcharge rules operate to force most merchants "to charge *all* consumers higher prices in order to cover the costs of accepting credit card transactions. As a result, non-credit consumers (food stamps, cash, checks, debit) end up subsidizing credit card consumers and, indirectly, subsidizing the entire credit card industry."[9] The estimated overall cross-subsidy between cash and credit users is staggering: "On average, each cash buyer pays $149 to card users and each card buyer receives $1,133 from cash users every year."[10]

The explosion in rewards card programs has exacerbated the problem of hidden cross-subsidies considerably. "Rewards cards have risen from less than 25 percent of new card offers in 2001 to nearly 60 percent in 2005" and now are considered to "drive the growth

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9 Warren, *supra* note 2, at 1.

10 *See* Scott Schuh, *et al.*, Federal Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, 3 (2010).

in . . . all credit card usage."[11] The power of rewards to increase credit card usage—though vitally, not to increase overall consumer spending—is closely tied with increases in swipe fees. In fact, rewards cards and corporate cards sometimes cost merchants twice as much in fees.[12] In 2007, Visa's ultra-premium rewards card's interchange rate at large supermarkets—among the merchants with theoretically the most leverage to negotiate fees—was 2.20% plus 10¢ per transaction, roughly double the average interchange fee.[13] Likewise, MasterCard's premium rewards card's interchange is as much as 3.25% per transaction.[14]

Far from being a problem for credit card networks, the across-the-board price increases work in their favor: "Card networks have the incentive to charge high interchange fees to inflate retail prices so that they can create more demand for their services . . . . As the card payments become more efficient and convenient than alternatives, the card networks are able to further raise the interchange fees, inflate the value of transactions and hence extract more profits" without benefiting either consumer surplus or merchant profits.[15] Neither merchants nor non-credit card users gain any marginal

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11 Levitin, *supra* note 3, at 1344–46.

12 Levitin, *supra* note 3, at 1323.

13 Levitin, *supra* note 3, at 1348.

14 Levitin, *supra* note 3, at 1333.

15 Zhu Wang, *Market Structure and Credit Card Pricing: What Drives the Interchange?*, 28 Int'l J. of Indus. Org. 86, 93 (2010), *available at* http://www.frbatlanta.org/news/CONFEREN/08payments/08payments_Wang.pdf.

benefit from these high-end rewards cards, but they both end up footing the bill for immense credit card company profits, and the generous rewards they provide to a tiny segment of consumers.

No-surcharge laws like New York's gag merchants and deny consumers vital information about the relative costs of payment forms, ensuring that cards are never put into serious price competition with each other or with other payment forms. But, as this case demonstrates, price signals are essential to a free market economy. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977). In a less competitive environment, companies have less incentive to price competitively and prices therefore increase. *Id.* at 377-78. Commercial speech restraints like the ones at issue thwart price competition. Thus, credit card companies will continue to engage in a race to the top by increasing swipe fees, without concern that consumer usage will be impacted.[16] No-surcharge laws aid in maintaining unified pricing at the point-of-sale, concealing from consumers that credit card users are free riding on cash consumers and simultaneously driving retail prices up. Meanwhile, merchants have no choice but to accept credit card networks' swipe fee increases.

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16 Levitin, *supra* note 3, at 1341 (citing Merchant Discount Fees, Nilson Rep., Aug. 2006, at 11; U.S. Interchange Fees, Nilson Rep., May 2003, at 10).

II. THE CROSS-SUBSIDIES CREATED BY NO-SURCHARGE LAWS ARE HIGHLY REGRESSIVE.

Credit card companies direct a small fraction of their supra-competitive profits to their richest customers at the cost of low-income consumers, effectively implementing a regressive tax on all consumers. Consumers using "cash"—which for purposes of this brief includes checks, debit cards, and food stamps—unknowingly pay a premium that subsidizes the credit card networks and their high income consumers. The distribution of the benefits is no accident: credit card companies almost exclusively target affluent consumers and corporate accounts for the most generous rewards.[17]

On average, cash consumers are far lower income, and embrace a larger proportion of minorities, than credit card users.[18] Ten percent of adult Americans are completely "unbanked" and therefore ineligible for credit cards.[19] Within the lowest income quintile of Americans, 29% are unbanked.[20] Credit cards are also disproportionately

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17 Levitin, *supra* note 3, at 1346 n.76 (citing Burney Simpson, *Merchants Tackle Credit Card Fee Policies*, Cards & Payments, 32 (Jan. 2006)).

18 *Id.*; *see also* William C. Dunkelberg & Robert H. Smiley, *Subsidies in the Use of Revolving Credit*, 7.4 J. Money, Credit & Banking 477 (1975).

19 Warren, *supra* note 2, at 1.

20 Adam J. Levitin, *Priceless? The Social Costs of No-Surcharge Rules*, Business, Economics and Regulatory Policy Working Paper Series No. 973974, 44 (Jan. 2008 Revision)

unavailable to minorities: "While less than 5% of the white, non-Hispanic population lacks a bank account, 20% of non-whites and Hispanics are unbanked."[21] Approximately 40% of the lowest income quintile of Americans have a credit card, while 67% of households with income of $20-$50 thousand per year, and 97% of households over earning over $120 thousand per year have at least one credit card.[22] Naturally, the distribution of access to credit cards means that this cross-subsidy overwhelmingly benefits high income consumers: "credit card spending by high-income consumers is nearly five times higher than credit card spending by low-income consumers, and . . . high-income consumers are 20 percentage points more likely to receive credit card rewards."[23] No-surcharge laws help facilitate this massive transfer of resources from cash users to credit card users, and even among credit card users, from low-income, low-rewards card users to high-income, high-rewards card users. Never having to bear the costs of their usage, rewards card users use credit cards more often and more exclusively than those without rewards credit cards.[24] "By far, the bulk of the transfer gap is enjoyed by high-income credit card buyers [income $100k+], who receive a $2,188 subsidy every year," as opposed to the low income credit card buyers, who "receive a subsidy [of]

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21 *Id.*

22 Schuh, *supra* note 10, at 8.

23 Schuh, *supra* note 10, at 8.

24 Andrew Ching & Fumiko Hayashi, Federal Reserve Bank of Kansas City, *Payment Card Rewards Programs and Consumer Payment Choice*, Working Paper No. 06-02, 4 (2006), *available at* http://www.kansascityfed.org/PUBLICAT/PSR/RWP/ching_hayashi_paper.pdf.

$613."[25] In absolute terms, the estimated transfer is about $1.4 billion to $1.9 billion from non-rewards consumers to rewards consumers on gasoline and grocery purchases alone.[26] Together, the no-surcharge laws support a unified-pricing mandate and run-away rewards programs, which are largely responsible for this enormous regressive and hidden wealth transfer. In effect, this allows credit card companies to tax the poor and give a small share of those proceeds to the rich.

III. NO-SURCHARGE LAWS DECREASE CONSUMER WELFARE.

So-called "network effects"—which predict that a decrease in a network's size will result in a decrease in the network's value for its remaining participants—do not support a ban on describing credit card fees as surcharges.[27] To the contrary, even if surcharging caused a decrease in credit card usage, it would increase overall consumer welfare because: *first*, some transactions will likely be diverted to other more inexpensive payment forms, like debit, which have their own network effects that will offset "harm" to credit card networks; and *second*, credit card usage has specific externalities which undermine the facile assumption that more credit card debt means more consumer welfare.

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25 Schuh, *supra* note 10, at 21.

26 *Id.* at 3 (citing Efraim Berkovich, *Card Rewards and Cross-Subsidization in the Gasoline and Grocery Markets*, Rev. of Network Econ. 11.4 (2012)).

27 *See* Levitin, *supra* at note 3, at 1385–90.

A. Increased Use of Other Payment Forms, Like Debit Cards, Along With Reductions in Swipe Fees, Will More than Offset the Welfare Costs of Decreased Credit Card Usage.

Surcharging will create genuine competition between payment forms, benefiting debit card users and driving down swipe fees for everyone. Because many other payment forms are subject to network effects, the diverted credit card usage would create comparable welfare gains in other networks. So the marginal loss to credit card users would be offset by the benefits to debit users. In fact, for newer payment forms, adoption matters a great deal more. By the time networks are as well-established and mature as credit cards, "the adoption and usage externality has become less important."[28] The qualities that most consumers cite as their reasons for using credit cards – convenience, security from theft, widespread acceptance, speed at checkout – are fully replaceable by other payment forms like debit cards, at *half* the cost.[29]

States have no legitimate interest in artificially sparing credit cards from free and open competition with other payment forms. If no-surcharge laws are necessary to maintain credit cards' position vis-à-vis other payment forms, it is preserving a market failure that substantially harms consumers. The Supreme Court has rejected state attempts to restrict advertising based on

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28 Wang, *supra* note 15, at 95.

29 Evans & Schmalensee, *supra* note 7, at 96. Many debit cards actually offer superior security through the use of pin systems and because debit card fraud does not affect a consumer's credit report, whereas credit card fraud does. Levitin, *supra* note 5, at 1387.

the "fear that people would make bad decisions if given truthful information." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002); *Bates*, 433 U.S. at 364 (holding that commercial speech "performs an indispensable role in the allocation of resources in a free enterprise system"). In fact, the most likely and significant outcome of allowing merchants to surcharge is decreased swipe fees. There is evidence that "no surcharge rules increase the price of all other payment systems to match the price of credit cards,"[30] explaining why interchange fees in the United States are more than double those in some other countries (Australia, EU cross-border, and the UK).[31] Australia's ban on no-surcharge rules immediately led to increased debit usage, while the average swipe fee fell by nearly half, across the board.[32] Significantly, it also led to increased volume on its network.[33] Moreover, even without no-surcharge rules, credit card companies continue to

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30 Levitin, *supra* note 3, at 1358 (citing Joseph Farrell, *Efficiency and Competition Between Payment Instruments*, 5 Rev. Network Econ. 26, 31 (2006)). Under current common contract terms, no credit card issuer would benefit from lifting the restraints unilaterally because the other, presumably more costly, credit card companies would still be protected by their own no surcharge rules. *See* Levitin, *supra* note 5, at 1359.

31 Stuart E. Weiner & Julian Wright, *Interchange Fees in Various Countries: Developments and Determinants*, 4.4 Rev. of Network Econ. 299 (2005), *available at http://www.academia.edu/3095968/Interchange_Fees_in_Various_Countries_Developments_and_Determinants.*

32 Reserve Bank of Australia Payment Statistics, Bulletin Table C3, Average Merchant Fees for Debit, Credit and Charge Cards, http://www.rba.gov.au/statistics/tables/xls/c03hist.xls.

33 Levitin, *supra* note 3, at 1389.

profit in Finland, the Netherlands, Portugal, Sweden, the United Kingdom, Switzerland, and Australia.[34] Similarly, the European Commission, following an extensive investigation, found that interchange fees imposed a "restriction on price competition [and] harms businesses and their customers" and determined that removing such restrictions would "foster[] greater competition in the cards market and prevent[] an artificial increase of merchant fees due to an illegal pricing mechanism...."[35]

In light of these real world examples, it is impossible to say with a straight face that no-surcharge rules really help consumers. On balance, the effects the decreased network effects for credit users are dwarfed by the gains in efficient market allocation. No-surcharge laws may be vital to the preservation of supra-competitive profit margins for credit card companies, but there is no economic theory that can twist this interest into a pro-consumer justification of the law.

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34 Levitin, *supra* note 3, at 1389 n.241. For an overview of global regulation of interchange fees, *see* Terri Bradford & Fumiko Hayashi, Federal Reserve Bank of Kansas City Payments System Research Briefing, *Developments in Interchange Fees In the United States and Abroad*, (Apr. 2008), *available at* http://www.kansascityfed.org/publicat/psr/briefings/psr-briefingApr08.pdf.

35 Antitrust: Commission prohibits MasterCards intra-EEA Multilateral Interchange Fees, Commission Européenne (Dec. 19, 2007), *available at* http://europa.eu/rapid/press-release_IP-07-1959_en.htm?locale=fr.

B. Overconsumption of Credit Card Debt Causes Uniquely Harmful Social Externalities.

A supposedly pro-consumer defense of no-surcharge laws based on spurring expanded use of credit cards is radically out of step with the facts of credit card debt consumption. Credit card debt in America was $870 billion by May of 2012.[36] Moreover, "Americans racked up nearly $48 billion in new credit card debt in 2011, 424 percent more than what they charged in 2010, and 577 percent more than in 2009.[37] Although total outstanding credit rose only about $4 billion, that number was largely offset by the magnitude of consumer defaults—*$44.2 billion worth.*"[38] As a result of a phenomenon unique to credit card debt, consumers consistently underestimate both the credit debt they already hold, and the costs they will eventually incur. In 2011, Americans held an average of $7,134 in credit card debt per household, but reported themselves as having an average of $2,000 less.[39] Credit card usage

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36 The Associated Press, *Consumers Take on More Debt*, N.Y. Times, (Jul. 9, 2012), *available at* http://www.nytimes.com/2012/07/10/business/credit-card-debt-climbed-by-8-million-in-may.html?_r=0.

37 Meg Handley, *Consumers Still Buried In Credit Card Debt*, U.S. News and World Report (Mar. 12, 2012), *available at* http://www.usnews.com/news/articles/2012/03/12/consumers-still-buried-in-credit-card-debt (emphasis added).

38 *Id.*

39 Meta Brown, *et al.*, Federal Reserve Bank of New York, *Do We Know What We Owe? A Comparison of Borrower- and Lender-Reported Consumer Debt* (Revised Oct. 2013), *available at http://www.newyorkfed.org/research/staff_reports/sr523.pdf*; *see also* Oren Bar-Gill, *Seduction by Plastic*, 98 Nw. U. L. Rev. 1373, 1396–402

is also causally linked to personal bankruptcy, and credit card companies target bankrupt and near-bankrupt households with predatory offers.[40] Following the ban on no-surcharge rules, Australia saw a 43% decrease in the gross of credit card debt.[41] A comparable reduction in the growth of American credit card debt, far from being a cost of surcharging, would be a highly desirable side effect.

IV. THE STATE'S JUSTIFICATIONS CANNOT SURVIVE INTERMEDIATE SCRUTINY AND ALTERNATIVE, LESS RESTRICTIVE MEANS ARE READILY AVAILABLE TO PROTECT CONSUMERS FROM POTENTIAL MERCHANT ABUSES.

The New York Attorney General offered three purported justifications for the no-surcharge law: (1) that "customers view [credit] surcharges as unjustified penalties," which "can cause consumer[s] anger and 'dampen retail sales,'" while "customers view cash discounts more positively," which "can actually encourage consumer spending," NY CA2 Br. 9, 11; (2) that "surcharges are much more strongly associated than discounts are with

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(2004); Levitin, *supra* note 20, at 50–52 (describing various studies outlining consumer under appreciation of the cost of credit).

40 *See* Teresa A. Sullivan, Elizabeth Warren, Jay Lawrence Westbrook *Credit Cards* at 108, The Fragile Middle Class: Americans in Debt, Yale University Press (2000) (outlining the connection between credit card usage and bankruptcy); Levitin, *supra* note 20, at 43.

41 *See* Adam J. Levitin, *The Antitrust Superbowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berk. Bus. L. J. 265, 332 (2005).

'dubious' and fraudulent sales practices" because they "make it easier for sellers to advertise a low regular price and then impose surprise credit-card fees at the point of sale," *id.* at 9-10, 43; and (3) that "sellers can and often will use surcharges to extract windfall profits from their customers," *id.* at 6. Each of these arguments falls flat, and the state's objectives can be achieved through alternative, less restrictive interventions.

The first justification, consumer unhappiness, does not provide a legitimate basis for severely curtailing the speech at issue. Indeed, the First Amendment is expressly designed to prohibit states from banning expression simply because it might be viewed as upsetting or otherwise objectionable. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989). The state's interests would be better served by ensuring that consumers have access to complete and accurate information. Regulation that keeps consumers in the dark "for what the government perceives to be their own good" is not a justification for prohibiting the dissemination of truthful information. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996). In fact, common sense dictates that accurate pricing information "is not in itself harmful" and "that people will perceive their own best interest if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Moreover, the suggestion that unhappiness regarding surcharging would chill consumer spending in the aggregate is frankly implausible. It is illogical to suppose that merchants would voluntarily institute surcharges so great that they cause reductions in spending at their own businesses. To the contrary, the

resulting lower retail prices should naturally stimulate *more* consumer spending. But even if that were not true, as a matter of law, worries based on irrational merchant and consumer reactions cannot justify the no-surcharge law. *See Pearson v. Shalala*, 164 F.3d 650, 655 (D.C. Cir. 1999) (characterizing as "almost frivolous" the government's argument that certain health claims "have such an awesome impact on consumers as to make it virtually impossible for them to exercise any judgment at *the point of sale*," as if they were "hypnotized"); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 167 (5th Cir. 2007) ("Attempting to control the outcome of the consumer decisions . . . by restricting lawful commercial speech is not an appropriate way to advance a state interest in protecting consumers.").

The second justification, fear of deceptive sales practices, is likewise unavailing. The state has proffered no evidence to demonstrate that this concern is anything more than theoretical.[42] Even assuming however, that the state's concern is grounded in reality, the no-surcharge rule is dismally crafted (and hugely overbroad) if its aim is in fact to protect consumers from merchants who could advertise misleading sticker prices and thereby engage in a "bait and switch."[43] Moreover, as a practical

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42 This is further supported by the fact that every major consumer advocacy organization, including Consumers Union and Consumer Federation of America, have long opposed state no-surcharge laws. *See* JA 103-104; *see also* Irvin Molotsky, *Extension of Credit Surcharge Ban*, N.Y. Times, Feb. 29, 1984,(quoting Senator William Proxmire, stating in debate on the Senate floor that "[n]ot one single consumer group supports the proposal to continue the ban on surcharges."), *available at* http://www.nytimes.com/1984/02/29/business/extension-of-credit-surcharge-ban.html.

43 A related defense of the no-surcharge rule argues that two-tiered pricing interferes with consumers' ability to comparison shop.

matter, enforcement of states' existing false and deceptive advertising laws would accomplish the same goal far less restrictively and more effectively. *See* N.Y. Gen. Bus. Law § 349. In addition to general prohibitions against deceptive advertising, the state could institute credit-card specific disclosure requirements to guard against abusive two-tiered pricing. For example, disclosure requirements like those proposed by the Federal Reserve Board would entirely protect consumers from deceptive surcharging.[44] *See Cash Discount Act, 1981: Hearings on S. 414 Before the Senate Banking Comm.*, 97th Cong., 1st Sess. 10 (Feb. 18, 1981) (proposing "a very simple rule": that both surcharges and discounts be allowed and "the availability of the discount or surcharge be disclosed to consumers."). Thus, existing anti-deception law or a more narrowly tailored requirement to give notice for credit card surcharges entirely dispose of concerns that consumers would be harmed by misleading prices

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There is no logic to this argument as a justification for disallowing surcharging while permitting discounts as "there is no reason to think that a comparison of maximum prices (allowing discounts, not surcharges) is any better than a comparison of minimum prices (allowing surcharges, not discounts)." Levitin, *supra* note 3, at 1383. Because discounts and surcharges are mathematically equivalent, allowing one and not the other relies on an impermissible "underestimation of the public," *Bates*, 433 U.S. at 375, especially if merchants are required to disclose their pricing structure.

44 *See* S. Rep. No. 97023, at 11–12 (1981); Council Directive 98/6, art. 3, 1998 O.J. (L 80) 28 (EC) (directing member states to adopt regulations requiring merchants to indicate both selling price and unit price for all covered products); *see also* Levitin, *supra* note 3, at 1384.

The third justification, windfall profits, is also meritless and can be addressed through far less restrictive means. As with the deceptive sales practice justification, the state has failed to offer any evidence, empirical or otherwise, to substantiate this concern. Indeed, the very study the state cited to advance its argument concedes as much. *See* Marc Rysman & Julian Wright, *The Economics of Payment Cards*, 16 (Nov. 29, 2012) (Working Paper, Boston University & National University of Singapore) (acknowledging that "empirical research on surcharging behavior would be very valuable"). Even assuming windfall profits are a real concern, the state's purported objectives can be achieved through less restrictive means that do not offend the First Amendment. For example, price differences (whether framed as a surcharge or a discount) can be capped, ensuring that surcharges for credit card users are within reasonable bounds, as it is in Minnesota. *See* Minn. Stat. Ann. § 325G.051(1)(a) ("the surcharge [may] not exceed five percent of the purchase price"). This would satisfy the state's purported objectives without hampering the free-flow of accurate information between merchants and consumers. In any case, credit card companies have far overstated the danger posed by surcharging because the marketplace, through consumer reactions, will naturally discipline merchants who would seek to abuse the right to describe a price difference as a surcharge. As a matter of fairness, sparing consumers who prefer credit cards the burden of weighing their preference against the savings of other payment systems is hardly a substantial state interest, worth imposing those costs on cash consumers, who have no choice but to pay for services from which they derive no benefit.

CONCLUSION

For the foregoing reasons, this Court should reverse the Second Circuit's decision.

Dated: November 21, 2016

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RECORD AND BRIEF

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EXPRESSIONS HAIR DESIGN, *et al.*,
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v.

ERIC SCHNEIDERMAN,
ATTORNEY GENERAL OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CREDIT UNION NATIONAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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SCHOLARLY AUTHORITY

Richard A. Epstein, *The Regulation of Interchange Fees: Australian Fine-Tuning Gone Awry*, 2005 Colum. Bus. L. Rev. 551 ..... 19, 20

OTHER AUTHORITIES

Webster's Third New International Dictionary (1993) 15

Bd. of Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S. Households in 2015* 1 (May 2016), http://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf 6

Bureau of Labor Statistics, *Table 1101: Quintiles of income before taxes: Annual expenditure means, shares, standard errors, and coefficients of variation, Consumer Expenditure Survey, 2015* (2016), http://www.bls.gov/cex/2015/combined/quintile.pdf 22

Consumers Fed'n of Australia, *Airlines still demand mark ups of over 500% on credit card surcharges* (Jan. 9, 2014), http://consumersfederation.org.au/airlines-still-demand-markups-of-over-500-on-credit-card-surcharges/ 25

Consumer Fin. Prot. Bureau, *What is a payday loan?*, http://www.consumerfinance.gov/askcfpb/1567/what-payday-loan.html (last visited Dec. 14, 2016) 20

TABLE OF AUTHORITIES—continued

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Experian, *How to Build Credit*, http://www.experian.com/blogs/ask-experian/credit-education/life-events/building-credit/ (last viewed Dec. 14, 2016) 7

JPMorgan Chase & Co., *About Us*, https://www.jpmorganchase.com/corporate/About-JPMC/about-us.htm (last visited Dec. 14, 2016) 2

Adam J. Levitin, *Interchange Regulation: Implications for Credit Unions* (2010), https://filene.org/assets/pdf-reports/224_Levitin_final_WEB.pdf 17

Heather Long, *ATM and overdraft fees top $6 billion at the big 3 banks* (Jan. 14, 2016), http://money.cnn.com/2016/01/14/investing/atm-overdraft-fees/ 7

MasterCard, *U.S. Region Interchange Programs and Rates, available for download at* https://www.mastercard.us/en-us/about-mastercard/what-we-do/interchange.html (last viewed Dec. 14, 2016)... 14

New S. Wales Office of Fair Trading, *Choice Report: Credit Card Surcharging in Australia* (2010), http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Credit_card_surcharges_part1.pdf 24

Reserve Bank of Australia, *A Variation to the Surcharging Standards: Final Reforms and Regulation Impact Statement* (June 2012) 24

Reserve Bank of Australia, *Standard No. 3 of 2016: Scheme Rules Relating to Merchant Pricing for Credit, Debit and Prepaid Card Transactions* (2016) 25

TABLE OF AUTHORITIES—continued

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Allen Rosenfeld, *Point-of-Purchase Bank Card Surcharges: The Economic Impact on Consumers*, New Am. Found. (May 2010), https://na-production.s3.amazonaws.com/documents/point-of-purchase-bank-card-surcharges 19

Marc Rysman & Julian Wright, *The Economics of Payment Cards* (2012) 14, 24

U.S. Gov't Accountability Off., *Automated Teller Machines* (2013), http://www.gao.gov/assets/660/653725.pdf..... 21

U.S. Gov't Accountability Off., *Credit Cards: Rising Interchange Fees Have Increased Costs for Merchants, but Options for Reducing Fees Pose Challenges* (2009), http://1.usa.gov/1wQTiKS..... 5, 6

ValuePenguin, *Bank ATM Fees: How Much Do Banks Charge and How Can I Avoid Them?*, https://www.valuepenguin.com/banking/bank-atm-fees (last viewed Dec. 14, 2016) 21

Gillian B. White, *Stranded: How America's Failing Public Transportation Increases Inequality*, The Atlantic (May 16, 2015), http://www.theatlantic.com/business/archive/2015/05/stranded-how-americas-failing-public-trans-portation-increases-inequality/393419/..... 21

Todd J. Zywicki, *The Economics of Payment Card Interchange Fees and the Limits of Regulation* (June 2, 2010), http://www.laweconcenter.org/images/articles/zywicki_interchange.pdf..... 6, 7, 8, 18, 19

INTEREST OF *AMICUS CURIAE*[1]

The Credit Union National Association (CUNA) is the largest organization representing America's credit unions. CUNA advocates for credit unions before Congress, federal agencies, and the courts. It also provides credit unions with training, compliance, and operational resources. CUNA likewise provides support on state issues and sponsors educational and networking opportunities for credit union volunteers and staff.

Credit unions are not-for-profit financial cooperatives with the statutory mission of meeting the credit and savings needs of consumers, often in low-income, rural, or underserved populations. See Credit Union Membership Access Act, Pub. L. No. 105-219, 112 Stat. 913 (1998).

> Credit unions, unlike many other participants in the financial services market, are exempt from Federal and most State taxes because they are member-owned, democratically operated, not-for-profit organizations generally managed by volunteer boards of directors and because they have the specified mission of meeting the credit and savings needs of consumers, especially persons of modest means.

Id. § 2(4), 112 Stat. at 914. Credit unions return their earnings to the consumers they serve in the form of

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus curiae* contacted counsel for all parties, who communicated their written consent to the filing of this brief.

better interest rates, lower minimum deposits, and lower fees.

Although there are approximately 104 million credit union memberships nationwide, credit unions are generally small and often struggle to compete with larger players in a fiercely competitive consumer financial services market. The median size for a U.S. credit union is roughly $28 million in assets. By comparison, JPMorgan Chase had approximately $2.4 trillion in assets as of 2016. JPMorgan Chase & Co., *About Us*, https://www.jpmorganchase.com/corporate/About-JPMC/about-us.htm (last visited Dec. 14, 2016).

To meet consumer expectations, credit unions offer many of the same financial products as commercial banks, including credit cards. Cost-effective card programs help credit unions fulfill a core part of their statutory mission to serve the credit needs of their members, including those of "modest means." See Credit Union Membership Access Act, § 2(4), 112 Stat. at 914.

CUNA and its members have an interest in this case because its outcome could negatively affect the use of credit cards and, as a consequence, CUNA's members. Petitioners seek to discourage credit card usage by imposing surcharges. These surcharges would make credit card purchases more expensive and compel many customers to use other forms of payment. With a diminished customer base and reduced cash flow, credit unions would suffer, and so would the members who depend upon them.

Among these members are many low-income individuals and their families. For a variety of reasons, as discussed below, they would be particularly hard-hit by a ruling that lessened the availability and utility

of credit cards. Not only would these members have diminished access to credit, but they could lose the benefits of other programs that credit unions offer, including free checking, the costs of which are offset by credit unions' revenues, including credit card revenues.

At bottom, New York State made a sensible economic choice by enacting legislation that protects consumers, credit unions, and other participants in the credit card market. The anti-surcharge law is quintessential economic legislation, which is consistent with federal legislation that was enacted decades ago. Petitioners' constitutional challenge lacks merit.

SUMMARY OF ARGUMENT

The challenged New York law is a classic price control, just like the many others that affect Americans each and every day. This Court has left no doubt that States have the power to set price controls for the goods and services sold within their borders. Price controls, including surcharges, regulate economic conduct, not speech, and States have inherent authority to regulate that conduct for the benefit of their citizens.

Petitioners emphasize the New York law's incidental effects on speech. But the fact that a law regulating economic conduct incidentally affects speech does not trigger any heightened requirements under the First Amendment. A contrary rule would subject countless economic regulations, including every price-control statute, to First Amendment scrutiny.

Laws like New York's are vital to preserving consumer credit card use—a payment method that confers important benefits on both consumers *and* mer-

chants. Credit cards play an especially helpful role for many low-income families, for whom credit cards are the best available source of funds for emergencies and cashflow management. Credit card revenues, like other financial institution revenues, also allow them to afford additional vital services, such as free checking and savings accounts. The New York law prohibits its merchants from imposing surcharges on this economically efficient form of payment and from gouging consumers at the cash register. The New York law is especially critical for credit unions, who have a statutory mission to serve consumers of modest means and who often can provide credit cards only if an adequate number of cardholders is maintained.

Striking down the New York statute would allow merchants to increase their profits under the guise of recovering interchange fees through a surcharge. Several features of surcharges facilitate this tactic, and empirical evidence from Australia's recent experience shows that surcharges effect a regressive wealth transfer from consumers—including low-income individuals—to merchants.

BACKGROUND

A brief discussion of how credit cards are processed and their benefits will help put the New York law into perspective.

1. When a consumer pays for merchandise with a credit card, typically five parties are involved in that transaction: (1) the consumer; (2) the merchant; (3) the merchant's financial institution, which processes credit card transactions (called the "acquirer"); (4) the consumer's financial institution (called the "issuer"); and (5) the network itself (e.g., Visa or MasterCard). Credit unions and other financial institutions that participate in the consumer financial services mar-

ketplace serve as issuers and acquirers. See U.S. Gov't Accountability Off., *Credit Cards: Rising Interchange Fees Have Increased Costs for Merchants, but Options for Reducing Fees Pose Challenges* 6–7 (2009), http://1.usa.gov/1wQTiKS.

A typical credit card transaction works as follows: When a credit union member applies for a credit card, the credit union assesses the applicant's ability to repay credit card debt based on the member's income and assets, existing debt obligations, and payment history. If the credit union concludes that the member is creditworthy, it issues a credit card. When the member later uses the card to make a purchase, a signal is sent to the merchant's acquirer. The acquirer in turn notifies the credit union via the network that the member wants to make a credit card purchase. The credit union then approves the transaction—assuming the purchase does not exceed the member's line of credit and is not indicated as fraudulent—and communicates its authorization through the network to the acquirer, which prompts the merchant to consummate the sale. All of this happens in the span of seconds. *Id.* at 6–9.

Once the purchase is complete, the merchant sends a payment request to the acquirer, which again signals the credit union through the network. The credit union responds by sending the requested funds through the network's settlement arrangement to the acquirer, which forwards the funds to the merchant less a discount fee. The discount fee typically includes a "switching" fee paid to the card network for processing the transaction, a payment to the acquirer, and an interchange fee to the credit union. The credit union's default interchange fee is generally established by the network. The total discount fee typically ranges from 1% to 3% of the purchase price. *Id.*

Although the credit union pays the merchant almost immediately, the consumer generally does not pay the credit union until a due date in the future. In the meantime, until the due date, the credit union effectively provides the consumer with an interest-free loan. The credit union also bears all of the risk of non-payment. *Id.* at 4; Todd J. Zywicki, *The Economics of Payment Card Interchange Fees and the Limits of Regulation* 8 (June 2, 2010), http://www.lawecon-center.org/images/articles/zywicki_interchange.pdf.

2. "Since its inception in the 1950s, the credit-card industry has generated untold efficiencies to travel, retail sales, and the purchase of goods and services by millions of United States consumers." *United States* v. *Am. Express Co.*, 838 F.3d 179, 184 (2d Cir. 2016) (reversing *United States* v. *Am. Express Co.*, 88 F. Supp. 3d 143 (E.D.N.Y. 2015)). For consumers, credit cards provide readily accessible credit that can be tapped in the event of a financial emergency. A recent survey revealed that 46 percent of Americans indicated that a $400 emergency expense would be a challenge to handle and that they either could not pay the expense or would have to borrow or sell something to do so. Bd. of Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S. Households in 2015* 1 (May 2016), http://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf. Furthermore, because bills and purchases often do not coincide with payroll cycles, credit cards also provide consumers with the important ability to prudently pay for certain purchases over time and when needed. That can be especially important for big-ticket purchases, such as appliances and furniture. See Zywicki, *supra*, at 7. And, because most issuers do not charge interest as long as the cardholder pays the card's balance before the next

billing cycle, the short-term loans that make this prudent cash flow management possible are free to consumers.

Credit cards confer a number of other consumer benefits in addition to the core benefit of providing accessible credit. Responsible use of credit cards is one of the key ways consumers build—or rebuild—their credit histories. See, *e.g.*, Experian, *How to Build Credit*, http://www.experian.com/blogs/ask-experian/credit-education/life-events/building-credit/ (last viewed Dec. 14, 2016). Using a credit card avoids the inconvenience of trips to the ATM or bank, as well as ATM fees, which reached $1 billion last year at the three largest banks alone. See Heather Long, *ATM and overdraft fees top $6 billion at the big 3 banks* (Jan. 14, 2016), http://money.cnn.com/2016/01/14/investing/atm-overdraft-fees/. Because credit cards track where they are used, they provide an easy way for cardholders to keep records. Credit cards facilitate purchasing online, which would be extremely difficult with cash or checks. Zywicki, *supra*, at 18. And credit cards come with robust antifraud protections. See, *e.g.*, 15 U.S.C. § 1643(a)(1)(B) (limiting cardholder liability for unauthorized credit card use to $50).

Credit cards also give merchants important benefits. Unlike checks, credit cards protect merchants against a risk of insufficient funds and default, and generally against the risk of fraud as well. Indeed, the avoidance of this risk alone—which cost Visa and MasterCard $65 billion in 2009—more than compensates for the interchange fees merchants pay. Zywicki, *supra*, at 8, 14. Merchants likewise are spared the logistical difficulties and safety risk of transacting in, storing, and protecting large quanti-

ties of cash on a daily basis. See, *e.g.*, 127 Cong. Rec. 4204, 4219 (1981).

In addition, because credit cards can serve as a buffer against unexpected expenses, they free up funds that consumers would otherwise have to hold against a rainy day, allowing them to spend more on merchandise. Credit cards also streamline the sales transaction process itself, shortening customer wait times (thus promoting consumer goodwill) and allowing merchants to make sales online or via automated systems when no attendant is available. See, *e.g.*, *Am. Express*, 838 F.3d at 185 ("Retail sellers get the benefits ... of increased trade because of consumer convenience...."). And, of course, many merchants—especially small businesses and startups—themselves rely on credit cards to provide the liquidity that makes doing business possible. Zywicki, *supra*, at 15 ("The availability of personal credit and business credit cards is thus likely an important source of economic stimulus, enabling businesses to start or grow even in a credit-constrained economy.").

ARGUMENT

I. THE NEW YORK LAW DOES NOT IMPLICATE THE FIRST AMENDMENT.

A. The New York Law Regulates Conduct, Not Speech.

This Court has left no doubt that a State "may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." *Nebbia* v. *New York*, 291 U.S. 502, 537 (1934). That authority is part of each State's broader power to "adopt whatever economic policy may reasonably be deemed to promote the public welfare"—a decision the courts may not question. *Id.*

In particular, a "[p]rice control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." *Id.* at 539. Relying on this principle, federal, state, and local governments have enacted statutes setting various price ceilings and floors, and these statutes play important roles in the lives of many Americans. See, *e.g.*, 29 U.S.C. § 206 (federal minimum wage); N.Y. Gen. Oblig. Law § 5-501 (anti-usury interest rate cap); S.F. Admin. Ordinance § 37.3 (rent control); Tex. Bus. & Com. Code Ann. § 17.46(b)(27) (anti-price gouging statute). This Court routinely upholds such pricing laws and has done so for decades. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519 (1992) (upholding rent control statute); *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U.S. 251, 257 (1931) (upholding ceiling on insurance agent compensation).

The challenged New York law is a classic price control, far outside the scope of the First Amendment. Just like many other price control statutes that Americans rely on every day, the New York statute sets a price cap. The law provides that merchants may not "impose a surcharge on a holder who elects to use a credit card." N.Y. Gen. Bus. Law § 518. In other words, merchants may not charge more than the regular price—typically the price on the price tag, advertisement, or grocery store shelf—when a customer chooses to pay with a credit card.

That is no different than capping the rent that a landlord may charge for an apartment, the interest rate that a bank may charge for a loan, or the markup that a merchant may charge during an emergency. Like these other ubiquitous price control statutes, the New York law regulates what people

may or may not *do*. It thus falls well within the States' long-recognized power to "regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." *Nebbia*, 291 U.S. at 537.

Petitioners' case hinges on the assertion that the New York law regulates what merchants may *say*. But that is simply false: The statute is silent on what merchants may say about credit cards, surcharges, or any other topic. Under New York's law, a merchant is free to explain—via a store-front banner, a message on all receipts, a bull horn, or any other medium of its choosing—its view on interchange fees or their effect on prices. The merchant is also allowed to say—after providing a discount for cash purchases—that credit card purchases are relatively more expensive. The law prohibits only one thing: charging a customer more than the regular price for using a credit card. That is conduct, not speech.

Petitioners argue that customers' adverse reactions to surcharges somehow make imposing a surcharge speech. See Petr. Br. 26. But economic conduct does not become speech simply because someone reacts to it. For instance, a gas tax does not violate the First Amendment even though higher gas prices would likely deter some customers and possibly drive up sales of Teslas. Indeed, the Supreme Court has blessed, as an example of a law that does not regulate speech, a price floor for alcoholic beverages enacted to promote temperance by prompting consumers to buy fewer drinks. *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 507 (1996) (plurality op.). A contrary ruling here would not only be unprecedented, but would also subject a massive array of economic regulation to First Amendment scruti-

ny—resuscitating *Lochner* and dressing it up in First Amendment garb. See *Lochner* v. *New York*, 198 U.S. 45 (1905).

B. The Incidental Effect on Pricing Communications Is Constitutionally Irrelevant.

The most that Petitioners can say is that the New York law implicates speech because merchants cannot impose a surcharge and, as a result, cannot tell consumers that credit card purchases will give rise to a surcharge. *E.g.*, Petr. Br. 1. But "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Rumsfeld* v. *Forum for Academic & Inst. Rights, Inc. (FAIR)*, 547 U.S. 47, 62 (2006) (quoting *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). Such incidental effects on speech do not trigger First Amendment scrutiny.

Indeed, most business regulations—including every price ceiling or floor—bring about incidental effects on speech. For instance, the federal minimum wage law, 29 U.S.C. § 206, has the incidental effect of preventing employers from telling employees that they will make less than the minimum wage. That fact, however, does not subject the law to First Amendment scrutiny.

The same is true for rent control regulations, anti-usury statutes, and all manner of other price regulations. A landlord cannot tell his tenant that the rent exceeds the regulated amount, and a banker cannot tell his customer that the interest exceeds the cap. But neither businessman can file a viable First Amendment claim.

Petitioners cannot point to any case subjecting such regulations to First Amendment analysis—let alone invalidating them under the First Amendment. Indeed, taken to its logical conclusion, Petitioners' position would require First Amendment analysis of not only those laws, but also laws banning employment discrimination on the basis of race because such laws "require an employer to take down a sign reading 'White Applicants Only.'" *FAIR*, 547 U.S. at 62. Yet this Court has explicitly rejected this notion. *Id.*

The Court's opinion in *FAIR* is particularly instructive. There, a federal statute required law schools to permit the military to recruit on-campus on the same terms as other employers. The schools argued that the statute violated the First Amendment by forcing them to provide recruiting assistance to the military in the form of speech (e.g., posting notices about recruiting on bulletin boards) if the schools provided similar assistance to other employers. *Id.* at 61–62. This Court rejected the schools' argument, explaining that "[t]he compelled speech to which the law schools point" is "plainly incidental" to the federal statute's "regulation of conduct," *i.e.*, permitting the military to recruit on campus. *Id.* at 62. So too here. Any effect of the New York law on merchant speech is "plainly incidental" to the law's regulation of conduct: forbidding merchants to impose a surcharge on credit card use.

Petitioners are not aided by this Court's cases establishing that the First Amendment protects the right of merchants to advertise lawful prices. See Petr. Br. 27 (citing, *e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)). Those cases dealt with prohibitions on speech itself, not a prohibition on conduct with inci-

dental effects on speech. See *44 Liquormart*, 517 U.S. 484 (invalidating prohibition on advertising prices for alcoholic beverages); *Bates* v. *State Bar*, 433 U.S. 350, 355 (1977) (invalidating restriction on advertisements of attorneys' billing rates); *Va. State Bd.*, 425 U.S. 748 (invalidating prohibition on advertising drug prices by pharmacists). And nothing in those cases suggests a departure from this Court's longstanding rule that a law regulating economic conduct does not violate the First Amendment by virtue of incidental effects on speech.

Indeed, Petitioners do not claim that New York's law prevents them from telling customers how much they will pay for merchandise, like the laws in the advertising cases Petitioners cite. See Petr. Br. 6; *compare 44 Liquormart*, 517 U.S. at 489–90; *Bates*, 433 U.S. at 354–55; *Va. State Bd.*, 425 U.S. at 749–50. Nor do Petitioners argue that they cannot speak to consumers about the effects of interchange fees; as explained *supra*, at 10, the New York law does not restrict such speech in any way. Petitioners' claim is instead that they cannot *impose a surcharge as a way of communicating* their views on interchange fees. Petr. Br. 1, 5–6. But imposing a surcharge, standing alone, would communicate nothing to customers; to make their point, merchants must include commentary explaining that the surcharge is due to interchange fees that, in their view, are too high. In other words, as in *FAIR*: "The expressive component of [the merchants'] actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection ...." *FAIR*, 547 U.S. at 66.

C. Surcharges and Discounts Are Not Two Sides of the Same Coin.

Petitioners' argument depends on their repeated insistence that "[a] 'surcharge' and a 'discount' are just two ways of framing the same price information—like calling a glass half full instead of half empty." Petr. Br. 1. But this argument misses the mark.

First, surcharges pose unique dangers that discounts do not present. For example, surcharges create a heightened risk of price gouging and cash-register surprises. That is because merchants can use surcharges to "add[] additional fees that appear only at the register, where it may be more difficult for consumers to opt out or make another payment selection ..., and where doing so makes price comparisons between merchants more difficult." Marc Rysman & Julian Wright, *The Economics of Payment Cards* 12 (2012); 127 Cong. Rec. 4219 (recognizing this difficulty en route to repassing federal surcharge ban); see also *infra*, at 24. This danger does not exist with regard to a merchant who raises the regular price to take interchange fees into account and offers discounts for choosing particular payment methods, both because customers will know the maximum they will pay (the regular price) at the outset and because merchants will have an incentive not to over-inflate the discount.

Surcharges also offer a tempting opportunity for fraud and misrepresentations by merchants. Consumers may have difficulty monitoring which of the wide array of interchange fees applies to a particular transaction. See, *e.g.*, MasterCard, *U.S. Region Interchange Programs and Rates, available for download at* https://www.mastercard.us/en-us/about-mastercard/what-we-do/interchange.html (last

viewed Dec. 14, 2016) (detailing various fees that may apply). Merchants may thus be able to represent that a profit-seeking surcharge is needed to cover interchange fees with little prospect of detection.

Furthermore, surcharges threaten to slow retail sales nationwide, with adverse ripple effects across the economy. Surcharges may unpleasantly surprise customers with a higher-than-expected bill at the register. Pet. App. 8a. This experience can cause consumer frustration and dampen overall retail sales. *Id.*

Second, Petitioners are simply wrong that offering a discount and imposing a surcharge constitute "identical conduct." Petr. Br. 1–2. The two concepts are *opposites*. A surcharge is "a charge in excess of the usual or normal amount: an additional tax, charge, or cost," *Webster's Third New International Dictionary* 2299 (2002), whereas a discount is "an abatement or reduction made from the gross amount or value," *id.* at 646. A law that allows discounts but does not allow surcharges simply treats different economic concepts differently; it does not choose between two alternative ways to describe "identical conduct." Petr. Br. 2.

To illustrate this concept, imagine a Wisconsin sports bar that lists beer at $5 per glass. The bar also offers a $1 discount to Packers fans and imposes a $1 surcharge on Vikings fans. It is perfectly clear that the discount and surcharge are not "two ways of framing the same price information," Petr. Br. 2, but instead are two completely distinct economic arrangements. If Wisconsin passed a law forbidding surcharges against Vikings fans but allowing discounts for Packers fans, no one would argue that the State was telling the bar which of two expressions it

could use to describe a single economic reality. Rather, the State would be forbidding one economic arrangement while permitting a completely different one. Likewise, a surcharge for credit card use and a discount for cash use are simply different things, and New York did not violate the First Amendment by allowing one and forbidding the other.

That is especially clear here, where multiple other forms of payment in addition to cash and credit cards exist, including debit cards, checks, and electronic payment systems such as PayPal. It is also true even in a case—unlike this one—in which the surcharged and discounted classes constitute together the entire population. For instance, imagine a gas station that offered a 5% discount to customers at least seven feet tall and charged everyone else the advertised price. No one would describe that arrangement as a surcharge on customers who are shorter than seven feet. Rather, the station's regular price is for customers who are shorter than seven feet, and it simply offers a reduction in price for very tall customers. Likewise, in this case, even if customers could pay only with cash or credit card, the surcharge on credit cards that the New York law prescribes would not be the same as a discount for cash use.[2]

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[2] Even if discounts and surcharges were economically identical here, New York's differential treatment of them would not violate the First Amendment, both because the New York law does not regulate speech, *see supra*, at 8–13, and because discounts and surcharges pose distinct risks that warrant treating them differently, *see supra*, at 14–15.

II. AS A REGULATION OF ECONOMIC CONDUCT, THE NEW YORK LAW SERVES IMPORTANT ECONOMIC POLICIES.

A. The Law Fosters Credit Card Use, Which Benefits Consumers and Merchants.

The New York law and others like it play the vital role of protecting credit card purchases from discriminatory burdens and price gouging. The statute prohibits merchants from singling out payment with a credit card for particularly unfavorable treatment, which would make credit cards less attractive to consumers. The New York law thus helps preserve the benefits that credit cards offer, including, as discussed earlier: providing a critical source of emergency liquidity and a means of prudent cash flow management (at no cost to consumers, as long as the monthly balance is paid in full); helping consumers build positive credit histories and keep accurate records; avoiding the inconvenience and expense of trips to banks and ATMs; and affording robust antifraud protections. See *supra*, at 6–7.

These benefits would be diminished insofar as surcharges discourage credit card use. Not only would credit cards be less desirable to consumers, but the surcharge would impact the availability of credit cards in the first place. Issuing credit cards is expensive, involving "substantial fixed costs that are feasible only when defrayed over large account and transaction volumes." Adam J. Levitin, *Interchange Regulation: Implications for Credit Unions* 39 (2010), https://filene.org/assets/pdf-reports/224_Levitin_final_WEB.pdf. When account and transaction volumes decline, so does the availability of credit cards.

The fixed costs of credit card issuance can prove especially difficult for credit unions, which are often

very small: The median size for a U.S. credit union is roughly $28 million in assets. For many credit unions, the ability to benefit their members by issuing credit cards depends on persuading a large percentage of members to use their cards and use them often, thus driving up the account and transaction volumes that defray the costs of card issuance.

Allowing merchants to impose credit card surcharges would seriously undermine credit unions' ability to issue cards. As members switch to other payment methods the merchants favor, credit unions that have already issued credit cards may find the fixed costs of maintaining their credit card programs insupportable. See Zywicki, *supra*, at iii ("community banks and credit unions—which rely especially heavily on interchange revenue—are likely to be harmed by interchange fee regulation and may be forced to shrink or cease their card operations"). And credit unions that have not yet issued credit cards will hesitate to do so, reducing access to credit cards. That result is inconsistent with Congress's mandate to credit unions to serve the credit and savings needs of "consumers ... of modest means."

Discouraging credit card use would also adversely affect many merchants. See *supra*, at 7–8. If, as a consequence of surcharges, credit card use diminished, many merchants would have to deal in larger stockpiles of cash, with the attendant expense and safety risk. And they would be exposed to greater risk of insufficient funds and fraud arising from checks. Customer wait times would increase, and fewer customers would purchase merchandise via the Internet or automated systems. The funds available for purchases would also decrease, as some consumers increase bank account reserves to serve as a safety net for unexpected needs. Merchants across the country

would experience these detriments, not just those who decide to impose surcharges. That is because the decision by some merchants to impose surcharges could prompt a number of consumers to stop applying for or using credit cards at all, out of fear of paying more for the same product.

A reduction in credit card use could also increase costs for merchants. After accounting for reduced labor and cash-processing expenses, increased sales, and other efficiencies, credit cards may be cheaper than other payment alternatives. See, *e.g.*, Allen Rosenfeld, *Point-of-Purchase Bank Card Surcharges: The Economic Impact on Consumers*, New Am. Found. 3 (May 2010), https://na-production.s3.amazonaws.com/documents/ point-of-purchase-bank-card-surcharges. "[T]he variable fees of card use are less than the variable costs of handling cash," and "empirical evidence shows [that] electronic payments are more cost-efficient than paper payments." *Id.* at 4. Thus, for many merchants in competitive markets, "the credit card price should be less than, not higher than, the cash price," even with acceptance fees. *Id.* at 3. "This would contradict the assumption that bank card use leads to higher retail prices, thereby undermining the claims of retailers advocating for the right to add surcharge fees to posted retail prices." *Id.* at 4. And the cost advantages of credit cards are only highlighted when costs of other payment systems "that are borne by consumers and society generally" are taken into account. Zywicki, *supra*, at 2.

In sum, "credit transactions fall within the domain of win-win transactions." Richard A. Epstein, *The Regulation of Interchange Fees: Australian Fine-Tuning Gone Awry*, 2005 Colum. Bus. L. Rev. 551, 567 (2005). They provide benefits to both consumers

and merchants, and "the only quarrel is over the size of the gain for each party." *Id.*

B. The Law Aids Low-Income Consumers.

Petitioners and their *amici* seek to portray the New York law as favoring the wealthy at the expense of the underprivileged. See, *e.g.*, Petr. Br. 8; Levitin Br. 22–25. But the New York law and others like it *help* low-income consumers. Specifically, these laws make critical financial tools available to low-income individuals and allow them to rely on advertised prices.

1. The Law Makes Important Financial Tools Available to the Underprivileged.

Reducing the costs of credit-card purchases is especially important for the economically disadvantaged, for whom credit cards often play a vital role. For instance, credit cards offer the most affordable method of cashflow management for many people who lack bank account reserves. Without a credit card, these individuals would be forced to turn to expensive alternatives, such as payday lenders, when bills are due before the next payday. See Consumer Fin. Prot. Bureau, *What is a payday loan?*, http://www.consumerfinance.gov/askcfpb/1567/what-payday-loan.html (last visited Dec. 14, 2016) ("A typical two-week payday loan with a $15 per $100 fee equates to an annual percentage rate (APR) of almost 400%. By comparison, APRs on credit cards can range from about 12 percent to 30 percent.").

Likewise, for people with low income, a credit card is often the only accessible source of funds in the event of a financial emergency, such as an unexpected hospital bill. See *supra*, at 6 (46 percent of Americans would not be able to cover a $400 emergency expense or would have to borrow or sell some-

thing to do so). A credit card also removes the inconvenience of frequent trips to a bank or ATM, which can be more burdensome to low-income Americans. See, *e.g.*, Gillian B. White, *Stranded: How America's Failing Public Transportation Increases Inequality*, The Atlantic (May 16, 2015), http://www.theatlantic.com/business/archive/2015/05/stranded-how-americas-failing-public-trans-portation-increases-inequality/39 3419/. And responsible use of a credit card can be a critical first step in rebuilding bad credit history.

Credit cards have important advantages over other payment methods. To rely on cash as a primary form of payment, a person must either keep a large sum on hand—risking serious hardship if the cash is lost or stolen—or rack up ATM fees by making many small withdrawals throughout the month. These fees—which are often the same regardless of the amount of cash withdrawn—impact low-income customers more than high-income customers. See, *e.g.*, ValuePenguin, *Bank ATM Fees: How Much Do Banks Charge and How Can I Avoid Them?*, https://www.valuepenguin.com/banking/bank-atm-fees (listing ATM fees charged by various banks).[3]

Credit cards help cardholders escape this dilemma. And credit cards likewise have important advantages over debit cards—for instance, allowing individuals to rent a car or check into a hotel, a task that often cannot be accomplished with a debit card due to the large transaction holds placed on the account, which may exceed available funds. Credit cards also serve the

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[3] That is especially true for independently-operated ATMs, which make up about half the market and charge higher fees. *See* U.S. Gov't Accountability Off., *Automated Teller Machines* (2013), http://www.gao.gov/assets/660/653725.pdf.

underprivileged in another important way: Like other financial institution revenues, credit card revenues can help offset the cost to credit unions of providing free services, such as checking and savings accounts, that the credit unions may otherwise find uneconomical to offer.

Contrary to Petitioners' claims that the New York law is regressive, the law actually *prohibits* regressive behavior by merchants. Low-income persons are likely to spend a far greater percentage of their income than high earners on expenses, such as food, clothing, and gasoline, that are sold at retail outlets. See Bureau of Labor Statistics, *Table 1101: Quintiles of income before taxes: Annual expenditure means, shares, standard errors, and coefficients of variation, Consumer Expenditure Survey, 2015* (2016), http://www.bls.gov/cex/2015/combined/quintile.pdf (lowest income quintile spent 55% of income on food, clothing, gasoline, drugs, and tobacco products, compared to 12% for highest quintile). A percentage surcharge by retail outlets would thus apply to a much higher percentage of the income of low earners than of high earners.

Petitioners' proposed rule would also lead to regressive results even outside the credit card context. On Petitioners' view, the First Amendment bars States and the federal government from prohibiting surcharges on *any* payment method, so long as discounting for any other method is allowed. Merchants would thus be permitted to impose surcharges for paying with debit cards and checks in addition to credit cards, pressuring disadvantaged individuals into a cash-only economy with its attendant inconveniences and fees. See *supra*, at 21. The First Amendment certainly does not tie States' hands in responding to these tactics.

2. The Law Allows Consumers to Rely on Advertised Prices.

As the State Consumer Protection Board recognized when the New York law was enacted, "permitting credit-card surcharges would undermine efforts to insure that customers can depend on advertised claims and prices." Pet. App. 8a (internal quotation marks omitted). That concern is especially important for many low-income persons. Living on a tight budget often means carefully comparing retailer advertising for the best deals on necessities such as food and clothing. Allowing surcharges simply for using a credit card would make this process much more difficult.

Surcharges would make price advertisements confusing at best and meaningless at worst. Unlike a sales tax—which applies uniformly to all merchants in a jurisdiction—a surcharge could be charged by only some merchants, and the amount of the surcharge could vary from merchant to merchant and from purchase to purchase. Merchants could even change their surcharge policy from one day to the next or impose surcharges for some credit cards but not others. See Frankel Br. 11. Price comparison is exceedingly difficult when non-advertised surcharges are involved. Discounts do not pose this problem, because they simply make goods *less* expensive than the consumer previously believed, and the merchant has every incentive to make the discount well-known.

C. International Evidence Supports the Economic Rationale Behind the New York Law.

Petitioners insist that surcharges are needed so merchants can recoup interchange fees. But the truth is that surcharges are more likely to provide cover for merchants to exact excess profits from consumers.

As explained above, several features of surcharges make them an ideal vehicle for covert price increases. See *supra*, at 14. They allow merchants to claim that a price increase is the fault of another company—namely, the credit card issuer—and hence shift any loss in consumer goodwill resulting from the price increase to the issuer. They also enable merchants to surprise customers with a price at the register after the customer has already committed to making the purchase or lacks time to seek the same item elsewhere for a lower price. Rysman & Wright, *supra*, at 15. And surcharges, as noted *supra*, at 23, make comparing prices difficult, allowing more expensive merchants to attract consumers who would ordinarily have shopped from a less pricy competitor. Rysman & Wright, *supra*, at 15.

Empirical evidence demonstrates that merchants use the ability to impose surcharges as cover for exacting additional profits. In 2003, the Reserve Bank of Australia issued regulations authorizing surcharges for paying with a credit card. Merchants responded by imposing surcharges that were, on average, twice the interchange fee the merchants themselves had to pay the issuers. *Id.* Furthermore, "this average surcharge ... increased [over time] even while [interchange] fees ... decreased." *Id.* Surcharges were often evident in industries in which consumers have limited alternative payment options. New S. Wales Office of Fair Trading, *Choice Report: Credit Card Surcharging in Australia* 14 (2010), http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Credit_card_surcharges_part1.pdf.

Faced with this evidence, Australian regulators implemented new reforms in 2012 to tie surcharges to the interchange fee. Reserve Bank of Australia, *A Variation to the Surcharging Standards: Final Re-*

forms and Regulation Impact Statement 1 (June 2012); see also Reserve Bank of Australia, *Standard No. 3 of 2016: Scheme Rules Relating to Merchant Pricing for Credit, Debit and Prepaid Card Transactions* § 4.1 (2016) (the "Permitted Surcharge for a Merchant and a Scheme ... is an amount not exceeding the Cost of Acceptance for that Merchant and that Scheme"). Even after the 2012 reforms, however, companies continued to hide profit-seeking price hikes in their surcharges. For instance, airlines in Australia "continue[d] to hit Australians with millions more in surcharges than it costs to process" their credit card transactions—including a surcharge of "523% more than the average merchant service fee" for some flights. Consumers Fed'n of Australia, *Airlines still demand mark ups of over 500% on credit card surcharges* (Jan. 9, 2014), http://consumersfederation.org.au/airlines-still-demand-markups-of-over-500-on-credit-card-surcharges/. Petitioners have advanced no reason to believe the American experience of surcharges will be any different.

CONCLUSION

For the foregoing reasons, and those stated by Respondents, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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RECORD AND BRIEF

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Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, et al.,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT SCHOLARS & FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

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[1] This brief is filed with the parties' consent. No counsel for a party wrote this brief in whole or in part; and no person or entity, other than the Amici and their counsel, has contributed money intended to fund the preparation or submission of this brief.

The First Amendment Lawyers Association (FALA) is an Illinois-based, not-for-profit organization comprised of about 200 attorneys across the United States, Canada, and elsewhere who routinely represent businesses and individuals engaged in free expression protected by the First Amendment. FALA has a tradition of submitting amicus briefs in cases where First Amendment speech rights are endangered.

This case interests the Scholars and FALA because of how it stands to impact the effective protection of commercial speech under the First Amendment. Under the decision below, laws with a main purpose or effect of limiting truthful commercial speech may evade First Amendment review so long as these laws are sufficiently disguised as mere regulations of economic conduct. This amicus brief explains how the Court's general First Amendment jurisprudence concerning the speech/conduct divide can be applied in the commercial arena to overcome this problem.

SUMMARY OF THE ARGUMENT

In 1934, the State of Louisiana passed a new law taxing the sale of newspapers with a circulation of more than 20,000 copies per week. *Am. Press Co. v. Grosjean*, 10 F. Supp. 161, 162 (E.D. La. 1935). A federal district court subsequently ruled that the law was an arbitrary business regulation and otherwise refused to consider if the law also violated the First

Amendment. *See id.* at 163. This Court saw things differently, finding the First Amendment challenge to be one of the "utmost gravity." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243 (1936). Then, after noting the oppressive effect of Louisiana's law on both newspaper advertising and circulation, the Court pronounced the following judgment: the law was "a deliberate and calculated device **in the guise of a tax** to limit the circulation of information" protected by the First Amendment. *Id.* at 250 (bold added).

Eighty years later, this Court has before it another disguised effort to limit the circulation of information protected by the First Amendment—this time, the real cost of paying with a credit card. New York General Business Law § 518 provides that "[n]o seller in any sales transaction may impose a surcharge" on those customers who pay with a credit card rather than cash. On face, this law seems like a mere business regulation: sellers must charge identical prices for credit-card sales and cash sales alike. But that is not how New York interprets or enforces this law. *See People v. Fulvio*, 517 N.Y.S.2d 1008, 1011 (N.Y. Crim. Ct. 1987).

In practice, New York allows sellers to impose higher prices on credit-card users—so long as the seller does so by inflating his usual sticker prices and then announcing a "discount" from these prices for cash users. *See* Pet'rs' Br. 17-19. A seller's liability under New York's surcharge ban thus depends entirely on what he says to a customer. *See id.* If a seller labels a television with a price tag of "$100 plus $2 for credit

card sales" or "$102, which includes $2 for credit card sales," the seller risks jail time. *See id.* But if the price tag reads "$102, with a $2 discount for cash sales," then the seller is in the clear. *See id.*

This Court has found that the First Amendment is implicated whenever "the conduct triggering coverage under [a] statute consists of communicating a message"—be it publishing a newspaper or announcing a sticker price. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). Yet, in reviewing New York's surcharge ban, the Second Circuit found that the ban "regulates conduct, not speech." Cert. App. 27a. Much like the district court in *Grosjean*, the Second Circuit settled for appearances, enabling a significant limit on free speech disguised as a mere business regulation to evade First Amendment review.

The Court should not allow this myopia to persist. The First Amendment protects "the consumer's interest in the free flow of truthful commercial information." *United States v. United Foods, Inc.*, 533 U.S. 405, 426 (2001). But not every government limit on the flow of commercial information "comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). Some of these limits come disguised as mere business regulations, and penetrating this disguise requires "careful and perceptive" application of the Court's standard in *Holder* for distinguishing limits on speech from limits on conduct. *Id.* Applying such analysis to New York's surcharge ban, it becomes clear that this ban is no mere regulation of pricing but rather a

limit on truthful commercial speech about prices that merits meaningful First Amendment scrutiny.

ARGUMENT

I. Lower courts need help identifying limits on commercial speech when disguised as mere regulations of economic conduct.

Lower courts often must decide whether a given business regulation merits First Amendment scrutiny. This decision turns on whether the business regulation is targeted at commercial speech or mere economic conduct. "It is well settled that the First Amendment mandates closer scrutiny of government restrictions on speech than of its regulation of commerce alone." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 193 (1999). For good reason: the "free flow of commercial information is indispensable" in our nation, where numerous economic decisions are made privately and "[i]t is a matter of public interest that those decisions . . . be intelligent and well informed." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

Some restrictions on commercial speech are easy to spot. State bans on advertising, for example, present a quintessential limit on commercial speech. *E.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (plurality op.) (First Amendment applies to ban on advertising of alcoholic content); *Va. State Bd. of Pharmacy*, 425 U.S. at 756 (First Amendment applies

to ban on drug-price advertising). Limits on commercial speech are also easily identifiable when a business regulation uses speech-based terminology like "solicit" or "promote." *E.g.*, *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 506 (6th Cir. 2008) ("[T]his provision regulates speech, not conduct, as it prohibits providers from 'stat[ing]' the tax on the bill."); *De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 128 F. Supp. 3d 597, 611 (E.D.N.Y. 2015) ("[T]he Ordinance does not simply prohibit conduct, i.e. stopping or attempting to stop a motor vehicle. Rather, it prohibits stopping . . . a motor vehicle for the purpose of soliciting employment of any kind.").

In the above-described cases, courts have little difficulty seeing through government efforts to evade First Amendment review by claiming that a challenged business regulation limits only economic conduct. As one district court has observed in a case where the government made such a claim in describing limits on certain marketing materials, "the activities at issue in this case are only 'conduct' to the extent that moving one's lips is 'conduct,' or to the extent that affixing a stamp and distributing information through the mails is 'conduct.'" *Wash. Legal Found. v. Friedman*, 13 F. Supp. 2d 51, 59 (D.D.C. 1998), *order vacated on jurisdictional grounds sub nom. Wash. Legal Found. v. Henney*, 202 F.3d 331, 336–37 (D.C. Cir. 2000). But matters become less clear when commercial speech is regulated through conduct-based terminology like "sale" or "transfer" or "use."

The Court encountered this reality most recently in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). At issue was a state law that banned the sale of pharmacy records to drug companies that revealed the prescribing practices of individual doctors. *See id.* at 557. The state argued that the law was exempt from First Amendment review "because sales, transfer, and use of prescriber-identifying information are conduct, not speech." *Id.* at 570. The First Circuit provided support for this view. *See IMS Health Inc. v. Ayotte*, 550 F.3d 42, 52–53 (1st Cir. 2008). The panel explained in regard to a similar state law that because the law targeted the conduct of "harvesting, refining, and selling" certain information, the First Amendment did not apply. *Id.* The panel also found it irrelevant that this conduct was directed at "information instead of, say, beef jerky." *Id.*

This Court disagreed. *See Sorrell*, 564 U.S. at 570. The Court noted that "the creation and dissemination of information are speech within the meaning of the First Amendment." *Id.* The dissemination of speech through the conduct of a sale did not alter this conclusion. *See id.* What mattered was that "prescriber-identifying information is speech" and the state sale ban denied drug companies access to this speech. *Id.* This led the Court to liken the ban to "a law prohibiting trade magazines from purchasing or using ink." *Id.*

Sorrell ultimately reflects how easy it is for lower courts to overlook limits on commercial speech when these limits are disguised in conduct-based terms. Lower courts need guidance to see through this kind

of facade, and the ongoing protection of commercial speech under the First Amendment depends on it. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 498 (1995) (Stevens, J., concurring). The Court has already noted that "the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct." *Greater New Orleans*, 527 U.S. at 193. And in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Court articulated a standard for respecting this speech/conduct distinction that merits application in the commercial arena.

II. This Court's analysis of the speech/conduct distinction in *Holder* should be applied in the commercial arena.

In *Holder v. Humanitarian Law Project*, this Court considered a First Amendment challenge to a federal law banning the provision of "material support or resources" to designated terror groups. 561 U.S. at 7. The government argued the First Amendment did not apply to the ban because it only regulated conduct—i.e., "the fact of plaintiffs' interaction" with the groups at issue. *Id.* at 26. The Court found that this argument went "too far" because the ban's force still turned on a review of what the plaintiffs wanted to say. *Id.* at 26–27. The ban would only apply if the plaintiffs imparted a specific skill or specialized knowledge, versus general or unspecialized knowledge. *See id.* Hence, while the ban could "be described as directed at conduct," it actually was a limit on the plaintiffs' speech since "the

conduct triggering coverage" under the ban "consist[ed] of communicating a message." *Id.* at 28.

This analysis of speech versus conduct furnishes a useful test for vetting First Amendment challenges to business regulations. Such regulations will often be cast in conduct-based terms. Yet, as *Holder* reveals, this does not mean that these regulations limit conduct alone. The question is whether the specific conduct that triggers the regulation "consists of communicating a message." *Holder*, 561 U.S. at 28. And in answering this question, courts should pay close attention to the purpose and the effect of the conduct being regulated. If either concerns the communication of a message, then the regulation should be found to govern speech, not conduct. *See Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("[While] the delivery of a tape recording might be regarded as conduct . . . the purpose of such a delivery is to provide the [tape] recipient with the text of recorded statements. . . . [A]s such, it is the kind of 'speech' that the First Amendment protects."); *Grosjean*, 297 U.S. at 244–45 (emphasizing the propriety of First Amendment review where a tax had the direct effect of suppressing newspaper circulation).

The following hypothetical illustrates this point. Imagine a town is trying to convince a popular juice bar to open a franchise, but the bar dislikes having to compete with child-run lemonade stands. The town council debates a blanket ban on lemonade stands but fears the bad press and citizen backlash that would follow. So, the council instead enacts the following

ordinance, with an eye toward discouraging consumers from patronizing child-run lemonade stands. Section 1 *bans* children from setting up lemonade stands and defines lemonade as "any mixture of lemon juice, water, and sugar." Section 2 *allows* children to set up lemon-drink stands and defines "lemon drink" as "any mixture of lemon juice, water, and sugar." A group of parents then challenges the law under the First Amendment. The council responds that the law merely regulates the economic conduct of selling lemonade.

Applying *Holder* to this hypothetical establishes why the council is wrong. Even if a given law "may be described as a regulation of conduct," the law may still be deemed to regulate speech when it is apparent that "the conduct triggering coverage under the statute consists of communicating a message." *Holder*, 561 U.S. at 28. If a town police officer comes across a child who is selling drinks from a pitcher filled with a mixture of lemon juice, water, and sugar, the officer cannot stop the child based on that conduct alone. Instead, the police officer can stop the child only if the child uses the term "lemonade" rather than "lemon drink" to describe the mixture being sold. The ordinance therefore merits First Amendment review under *Holder* because "the conduct triggering coverage" under this law consists of communicating a message—i.e., describing a mixture of lemon juice, water, and sugar as "lemonade" rather than as "lemon drink."

It is easy to imagine other evidence that could be offered to show that this hypothetical law regulates speech, not conduct—for example, a letter from the

town council to the juice bar explaining that "lemon drink" is a term that has a negative effect on the minds of consumers. The bottom line, however, is that the law is a labeling restriction in the guise of a sales ban, and applying *Holder* ensures that this law does not evade proper First Amendment review. Lower courts have unfortunately overlooked the value of *Holder* in navigating the speech/conduct divide in the commercial arena. As a result, these courts have failed to recognize why state credit-card surcharge bans warrant First Amendment review to the extent these same bans allow sellers to offer "discounts" on surcharge-boosted prices to customers who decide to pay by cash.

III. Applying *Holder* here reveals that New York's credit-card surcharge ban is a limit on commercial speech, not conduct.

This case concerns a First Amendment challenge to a New York law banning sellers from "impos[ing] a surcharge" on consumers who pay by credit card rather than by cash. N.Y. Gen. Bus. Law § 518; *see* Pet'rs' Br. 20–21. At first glance, this ban seems only to prohibit sellers from charging different prices based on mode-of-payment. In short, the ban "may be described as directed at conduct." *Holder*, 561 U.S. at 28.

The way that New York enforces this ban tells a different story. As far as New York is concerned, sellers *may* use mode-of-payment to vary the ultimate price that customers pay. *See* Pet'rs' Br. 17–19. The ban only

affects how sellers explain this price variance. *See id.* A stark example of this can be seen in directions given by the New York Attorney General's Office to one seller in enforcing the ban: "You can charge more for a credit card all you want, but **you have to say** that this is the cash discount rate." J.A. 115 (bold added). The Attorney General's Office gave this direction because of how the seller had been previously explaining the cost of paying by credit card to customers. *See id.*

New York has thus established that "the conduct triggering coverage" under its surcharge ban "consists of communicating a message"—namely, the message that it costs more to pay with a credit card than to pay with cash. *Holder*, 561 U.S. at 28. Or as the district court put it, the ban "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." Cert. App. 73a. Hence, under *Holder*, New York's surcharge ban merits First Amendment review. While prices may be "a routine subject of economic regulation," the manner in which "price information is conveyed to buyers is quintessentially expressive." Cert. App. 74a.

The Second Circuit, however, found that New York's surcharge ban "regulates conduct, not speech." Cert. App. 27a. The panel reached this conclusion by deeming the ban to limit just "the difference between a seller's sticker price and the ultimate price that it charges to credit-card customers." Cert. App. 21a–22a. This analysis presumes that a "surcharge" exists only when a seller requires a credit-card user to pay more

than a given sticker price (e.g., "$100 plus $2 for credit-card users"). But a surcharge exists in equal measure when a seller requires a credit-card user to pay more than a cash user (e.g., "$102 minus $2 for cash users"). In both instances, the consumer pays more for using a credit card (i.e., $102)—the only difference is how the seller explains this excess charge to the consumer (i.e., by using the term "surcharge" versus "discount").

The Eleventh Circuit recognized this in reviewing Florida's credit-card surcharge ban under the First Amendment: "[t]autologically speaking, surcharges and discounts are nothing more than two sides of the same coin; a surcharge is simply a 'negative' discount, and a discount is a 'negative' surcharge." *Dana's R.R. Supply v. Att'y Gen., Fla.*, 807 F.3d 1235, 1239 (11th Cir. 2015). The panel thus recognized that the "sole effect" of Florida's surcharge ban was to keep sellers "from uttering the word surcharge, criminalizing speech that [was] neither false nor misleading." *Id.* at 1251; *see id.* at 1245 (describing the ban as a "surcharges-are-fine-just-don't-call-them-that law").

In the end, had the Second Circuit factored *Holder* into its analysis of New York's surcharge ban, it would have been able to recognize that this ban is a regulation of speech disguised as a regulation of conduct. But the panel overlooked *Holder* and instead drew upon this Court's holding in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, that a law "regulates conduct" when the law dictates what a person "must

do . . . not what they may or may not *say*." 547 U.S. 47, 60 (2006) (italics in original); *see* Cert. App. 20a. The problem with this reasoning is that New York's surcharge ban (i.e., as enforced by New York) does not dictate what sellers must do *except by reference* to what sellers may or may not say. *See* Pet'rs' Br. 17–19.

Of course, the First Amendment would not prevent New York from enforcing its surcharge ban as a true ban by requiring sellers to charge the same price to everyone no matter how anyone pays. This fits with the "First Amendment's preference for resolving policy problems by regulating conduct rather than speech." *BellSouth Telecomms., Inc.*, 542 F.3d at 509. At present, however, New York allows differential pricing based on mode-of-payment so long as the extra charge for credit-card users is hidden in a sticker price and then framed as a "discount" for cash sales. *Cf. De La Comunidad Hispana De Locust Valley*, 128 F. Supp. 3d at 611 ("The Ordinance does not prohibit just any stopping or attempting to stop a vehicle. Its prohibition reaches that conduct only when accompanied by an expression of the availability of a job or of a person for employment. . . .").

There lies the importance of recognizing that New York's surcharge ban regulates speech, not conduct—the opposite view risks "unleash[ing] a principle of constitutional law that would have no obvious stopping place." *Luis v. United States*, 136 S. Ct. 1083, 1094 (2016) (plurality op.). This danger may be seen in a law that Kentucky passed to limit the circulation of

information about a new telecom tax. *See BellSouth Telecomm.*, 542 F.3d at 500–01. The law contained two key provisions: (1) a "no-direct-collection clause," that banned telecom providers from "collect[ing] the tax directly from" customers; and (2) a "no-stating-the-tax clause," that banned telecom providers from "separately stat[ing] the tax on the bill" to customers. *Id.* at 501, 504. Given the plain language of the no-stating-the-tax clause, the Sixth Circuit easily found that Kentucky's law warranted First Amendment review. *See id.* at 506 ("[T]his provision regulates speech, not conduct, as it prohibits providers from 'stat[ing]' the tax on the bill.").

Under the Second Circuit's view, however, Kentucky could have omitted the no-stating-the-tax clause and enforced the no-direct-collection clause in the same manner that New York enforces its surcharge ban: by letting telecom providers increase their prices to cover the tax and then barring providers "from using their invoices to say why." *Id.* at 500. This would leave the providers with no First Amendment claim because the no-direct-collection clause appears only to regulate the conduct of tax collection. This outcome then opens the door to a new universe of censorship in which the First Amendment is toothless so long as the government regulates commercial speech by using the terminology of economic conduct.

All of this runs counter to the First Amendment's purpose and design, which directs courts to be on guard for "regulations that seek to keep people in the dark for what the government perceives to be their

own good." *44 Liquormart*, 517 U.S. at 503 (opinion joined by Stevens, Kennedy, & Ginsburg, JJ.). It is therefore vital for this Court to make it clear that the First Amendment always applies when "the conduct triggering coverage under [a law] consists of communicating a message"—even in the commercial arena. *Holder*, 561 U.S. at 28. Applying that standard here, New York's surcharge ban regulates speech and is subject to First Amendment review. Whether the ban survives First Amendment review by being properly tailored to an important government purpose is a separate question beyond the scope of this brief. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980). The point is that the ban must be subjected to First Amendment review, even though it may appear on face only to regulate economic conduct.

CONCLUSION

New York Yankees catcher Yogi Berra is well known for having once said: "When you come to a fork in the road, take it." Less well known is why Berra said this. He was explaining that his house could be reached by taking either side of a forked road leading to it.[2] The same idea applies to New York's surcharge ban. As with Berra's forked road, both paths of the ban

[2] *See* Mary-Jayne McKay & Bob Simon, *The Wisdom of Yogiisms: Did He Really Say That?*, 60 MINUTES (CBS NEWS), Mar. 6, 2002, http://cbsn.ws/2fZ3vEY.

("surcharge" or "discount") lead to the same end: credit-card users pay more while cash users are free to pay less.

The only difference between the paths is the words used to describe them, and that is all that New York has sought to regulate in requiring sellers to use the discount path rather than the surcharge path in stating prices to consumers. That inescapable reality brings the First Amendment into play, as this Court recognized in *Holder v. Humanitarian Law Project*. The Court should therefore reverse the Second Circuit and hold that New York's surcharge ban merits First Amendment review as a disguised limit on commercial speech.

Respectfully submitted,

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RECORD AND BRIEF

No. 15-1391

IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, ET AL.,
Petitioners,

v.

ERIC T. SCHNEIDERMAN,
IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL
OF THE STATE OF NEW YORK, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF FIRST AMENDMENT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The following scholars are experts in the First Amendment, each of whom has published a book or law review article on the subject. *Amici* law professors teach or have taught courses in constitutional law or the First Amendment and have devoted significant attention—in some cases, for several decades—to studying the First Amendment:

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

[2] Institution names are provided for purposes of affiliation only.

INTRODUCTION

This Court's decisions interpreting the First Amendment have given robust protection to commercial speech, requiring courts to carefully review government regulation of commercial advertising and other forms of speech to ensure consistency with vital free speech principles. At the same time, these decisions have also insisted—in line with this Court's repudiation of the economic substantive due process cases of the early twentieth century—that federal, state, and local governments have wide leeway to regulate the sale and pricing of commercial goods. *See, e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (observing that "direct regulation" of alcohol pricing "would not involve any restriction on speech"); *id.* at 524 (Thomas, J., concurring) (recognizing that "direct regulation" of pricing "involve[s] no restriction on speech regarding lawful activity at all"). In this case, Petitioners confound this clear line, urging the Court to strike down as a violation of the First Amendment a state law that regulates the prices a merchant may charge to those who pay for goods and services using a credit card. Because this law regulates the pricing of goods and services and has, at most, an incidental impact on speech, Petitioners' First Amendment attack should be rejected.

In New York, it is illegal for a merchant to charge customers who use credit cards more for an item than its posted price. The Petitioners in this case, five New York businesses and their owners and managers, contend that this law unconstitutionally violates their freedom of speech simply because it does not also prevent them from charging *less* than an item's posted price. This unprecedented view of the First Amendment should be rejected and the decision below affirmed. Even on the broadest reading of this Court's

decisions, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011).

New York's ban on credit-card surcharges regulates a particular type of economic transaction, not the manner of describing that transaction. It thus regulates conduct rather than speech. Interpreted consistently with the expired federal surcharge ban it replaced, the law has a simple meaning: when merchants post a single price for an item or service, they must allow individuals to use a credit card when purchasing the item or service for that price. The First Amendment does not prohibit this rule.

Although merchants theoretically can achieve the same price difference between cash and credit transactions by increasing their posted prices, and then offering discounts for cash, this does not convert the statute into a regulation of speech. It simply means that merchants can buy back the consumer's right, provided by the New York law, to use a credit card when making his purchase. Indeed, the New York legislature had good reason to focus its statutory prohibition on credit-card surcharges, rather than cash discounts. Despite the mathematical equivalence of imposing surcharges and offering discounts, there are real and meaningful differences between the rival systems. Where surcharges are permitted, for instance, merchants can induce customers to initiate a purchase with the promise of one price, only to raise that price after the customer has invested time and effort pursing the transaction.

While New York's surcharge ban regulates economic conduct rather than speech, this does not mean the law has *no* effect on the speech interests of mer-

chants and customers. The inability to impose surcharges may foreclose at least some communicative opportunities that might otherwise arise, through speech facilitating a surcharge addition, or because surprising consumers with an increase in price draws their attention to the higher cost being demanded for the use of credit. But those lost opportunities are merely the incidental byproduct of a "restriction[] directed at commerce," *Sorrell*, 564 U.S. at 567, and the "effect is no greater than is necessary to accomplish the State's legitimate purposes," *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984). The law leaves merchants free to express any idea, on any topic, through any means, with one exception: they simply may not communicate to customers that persons using credit cards are being charged more for an item than its tagged price. This illustrates that the law is aimed at the "commercial aspect" of surcharges, not at the "substance of [any] information communicated" about those charges, about swipe fees, or about the credit-card industry. *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 96 (1977).

Moreover, the communicative value of imposing a prohibited surcharge is "attenuated at best." *Roberts*, 468 U.S. at 627. New York's law does not prevent a merchant from establishing a price difference between cash and credit purchases, advertising the relevant prices, calling attention to the cash/credit difference, or explaining how that difference is a response to the costs of industry-inflicted swipe fees. The sole act that it does prevent—charging more than a posted price—communicates nothing by itself about *why* the seller requires a fee for credit payments. If an explanation is provided, it "is not created by the conduct itself but by the speech that accompanies it." *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 66

(2006). And the act of imposing a surcharge does not become protected speech merely because it may be a useful tactic for drawing attention to the higher cost of credit purchases. This Court has consistently rejected the "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

Petitioners' First Amendment challenge threatens to upend settled understandings of the line between constitutionally protected speech, which this Court has protected against unjustified abridgement, and economic conduct, which federal, state, and local governments may regulate with a freer hand. Subjecting laws like New York's to the heightened scrutiny that governs restrictions on speech, commercial or otherwise, risks enmeshing the nation's courts in assessing the wisdom of a vast range of regulatory measures. For good reason, "[i]t cannot reasonably be demanded . . . that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576 (1991) (Scalia, J., concurring).

Importantly, it is far from clear how the "speech" sought to be protected here can be firmly separated from various other forms of economic conduct regulated outside the First Amendment. Compromising the speech/non-speech distinction, as Petitioners urge, would detract from the elected branches' ability to legislate in areas traditionally subject to government regulation. Apart from aggrandizing the role of the judiciary, the ultimate consequence may be a watering

down of the standards that apply to genuine speech restrictions, as courts might come to demand less compelling showings of a governmental interest or less precision in the means used to advance it. "[O]veruse of First Amendment scrutiny" could thus "trivialize the significance of applying First Amendment protections" in the mine-run of commercial speech cases. *See* Srikanth Srinivasan, *Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court Jurisprudence*, 12 Const. Comment. 401, 406 (1995). That "devitalization" of "the force of the Amendment's guarantee," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), would jeopardize—not help realize—the Constitution's protection of freedom of speech.

ARGUMENT

I. NEW YORK'S SURCHARGE LAW REGULATES ECONOMIC TRANSACTIONS, NOT THE MANNER OF DESCRIBING THOSE TRANSACTIONS

A. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (alteration in original)). "Commercial speech is no exception," this Court has held, for a "'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.'" *Sorrell*, 564 U.S. at 566 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)); *see Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366 (2002) ("It is a matter of public interest that [economic] decisions, in the aggregate, be intelligent and well-informed. To this end, the free

flow of commercial information is indispensable." (quoting *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (alteration in original)). Because commercial speech doctrine vindicates the rights of listeners to receive accurate information, the Amendment does not protect a business's desire to keep consumers in the dark about its goods or services. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) ("commercial speech that is false, deceptive, or misleading" is unprotected).

As this Court has explained, the First Amendment thus limits the power of the government to restrict truthful, nonmisleading speech by businesses advertising their goods and services, forbidding a state from enacting paternalistic regulations "that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart*, 517 U.S. at 503. However, the First Amendment has never been read to limit the government's power to regulate the terms and conditions for selling goods and services, such as the prices that may be charged. "[I]t has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold." *Munn v. Illinois*, 94 U.S. 113, 125 (1876).

Accordingly, "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell*, 564 U.S. at 567. "[A] State's regulation of the sale of goods differs in kind from a State's regulation of accurate information about those goods," therefore, and

this Court's decisions "have consistently drawn" a "distinction . . . between these two types of governmental action." *44 Liquormart*, 517 U.S. at 512. In light of that distinction, the "heightened standard appropriate for the review of First Amendment issues" is not applicable to a mere "review of economic regulation." *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 469 (1997).

Of course, commercial transactions are "linked inextricably" with commercial speech proposing them. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). But the enduring distinction the Court has drawn between commercial transactions, on the one hand, and commercial speech, on the other, reflects the Court's consistent recognition that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld*, 547 U.S. at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). "[W]ords can in some circumstances violate laws directed not against speech but against conduct." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992). Thus, the mere fact that a law prevents a business from engaging in speech that accompanies an illegal transaction "hardly means that the law should be analyzed as one regulating the [business's] speech rather than conduct." *Rumsfeld*, 547 U.S. at 62; *see United States v. Williams*, 553 U.S. 285, 297 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection."). In sum, although states generally may not criminalize truthful speech about lawful economic transactions, *Va. State Bd.*, 425 U.S. at 773, they may, without triggering heightened

First Amendment scrutiny, criminalize the transactions themselves. *Sorrell*, 564 U.S. at 567.

B. New York's surcharge ban regulates a type of economic transaction, not the manner of describing that transaction. It provides that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. The "core meaning" of this measure is simple: "sellers who post single sticker prices for their goods and services may not charge credit-card customers an additional amount above the sticker price that is not also charged to cash customers." Pet. App. 42a. In other words, once a merchant has communicated to a customer, "I will sell you the X [product] at the Y price," *Va. State Bd.*, 425 U.S. at 761, the merchant may not charge the higher Z price instead.

On its face, Section 518 unmistakably prohibits conduct—the completion of a "sales transaction." The law does not purport to prohibit speech, compel speech, or constrain in any way the dissemination of information or the words used by merchants. *Compare Sorrell*, 564 U.S. at 564 ("The law on its face burdens disfavored speech by disfavored speakers."), *with Rumsfeld*, 547 U.S. at 60 (the law "affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*"). Instead of purporting to regulate speech, Section 518 criminalizes transactions based on the price charged—singling out prices higher than the "usual or normal amount" for the item or service. Pet. App. 13a (quoting definition of "surcharge" in *Webster's Third New International Dictionary* 2299 (2002)). Thus, just like its federal predecessor, New York's law prohibits the act of charging customers more for an item or service than

the price already posted by the merchant. *Id.* at 42a. "[T]he conduct triggering coverage under the statute consists of" ringing up a sale, not "communicating a message," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010), and any burden on speech is plainly incidental to that regulation of conduct.

Indeed, the New York law is essentially a bundling requirement, no different than if New York required that any battery-powered appliance be sold with a battery. Section 518 requires that any good or service be bundled with the right to use a credit card. The merchant may be able to buy back that right by offering a discount for using cash, but when he offers to sell X product at Y price, that offer must include the right to use a credit card without a separate fee. Whatever the merits of New York's policy judgment that credit-card use should be free of hindrances like unpredictable price increases, that is the type of commerce-related judgment that states traditionally have made. *See Giboney*, 336 U.S. at 504, 497 (noting the "paramount" power that states historically have held over "their domestic economy").[3]

Section 518 is not somehow transformed into a regulation of speech merely because merchants may in-

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[3] Whether a seller has violated the surcharge law does hinge, of course, on what that seller previously represented an item's price to be. Identifying a violation therefore requires examining a seller's "speech," to the extent that an item's marked price qualifies as speech. But so do most efforts to determine whether a person offered or consummated an illegal sale. For instance, determining whether a person illegally offered to sell human organs or legally offered to sell human blood, *see* 42 U.S.C. § 274e(a), requires examining the language of the offer. That does not mean the law is a speech restriction.

crease the initial posted price of an item, while providing discounts from that increased price to cash-paying customers. It is true, of course, that a discount system can be structured to produce the same price difference between cash and credit—pricing an item at $103 with a $3 cash discount, for instance, instead of $100 with a $3 credit surcharge. But in practice these rival approaches can be regarded as "identical" only if the customer in each situation is provided with both the cash and credit price at the outset. Petitioners' claim to the contrary requires equating two very different chains of events: (1) a customer sees a product advertised for $103, decides to purchase it, and does so; (2) a customer sees a product advertised for $100, decides to purchase it, takes steps toward purchasing it, learns at the point of sale that the price will actually be $103, and then decides to finish the transaction by purchasing it for $103. According to Petitioners, "there is no real-world difference" between these two situations. Pet'r Br. 28. But the real world includes more than the ultimate price paid for an item. While two different merchant-customer interactions can culminate in a credit-card user paying $103 for a product, the equivalence in price does not make the transactions identical.

To make this point concrete, imagine a person considering the purchase of a new household appliance. Having inspected several alternatives and considered his needs and finances, he settles on a model and resolves to purchase it, proceeding to the register and waiting in line. When it is his turn, an employee informs him that a 3% surcharge will be added if he pays by credit, which happens to be his only option. With other customers waiting, he now must make a decision: Does he change his mind and call off the purchase on the chance that a different store sells the item

for less? Does he risk signaling to other patrons or to the store employee that he cannot afford the surcharge? Or does he simply pay the higher price? Varying the scenario, imagine that the customer, engrossed in conversation, fails to notice a posted sign stating that a 3% surcharge will be added to credit-card purchases (the store employee says nothing about it) and realizes only later that several dollars, or perhaps more, were added to the price of his item. Or consider another variant in which a customer chooses to visit an establishment—say, a gas station—because of an advertised price, only to find that the price is actually higher than a competitor's because the posted amount did not include a surcharge.

As these examples highlight, one real-world difference between surcharge and discount systems is *when the higher credit-card price may be revealed to the customer*. Surcharges allow merchants to delay sharing that information until a customer has invested time and effort pursuing a transaction, making him less likely to back out even if the terms of the deal become less attractive at the point of sale. Put another way, a surcharge system allows merchants to raise prices in the middle of a transaction. Section 518 was enacted to prevent the harms that flow from such "unannounced price increases." J.A. 89; *see* Resp't Br. 13 (legislation was intended to prohibit "'dubious' tactics that place consumers at an 'unfair disadvantage'" (quoting J.A. 82-83)).

The significance of these harms is more than a commonsense intuition. Economists have long recognized that "[t]he total effective price for any good" includes not just "the pure price of the good itself" but also "the marginal cost of shopping for it," including "transportation costs" and "the purchaser's valuation

of time and inconvenience associated with the shopping trip." Richard P. Brief, *Measuring Shopping Costs*, 15 J. of Indus. Econ. 237, 237 (1967).[4] Increasing a price, after a consumer has expended energy pursuing the item, can exploit the irrational "tendency to continue an endeavor once an investment in money, effort, or time has been made." Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 Org. Behav. & Hum. Decision Process 124, 124 (1985). While the consumer "is not imprisoned on site," the merchant "has some control over the consumer's physical presence and attention," and "[t]ime, the ultimate scarce resource, may constrain the consumer's choices." David Adam Friedman, *Explaining "Bait-and-Switch" Regulation*, 4 Wm. & Mary Bus. L. Rev. 575, 587 (2013); *see id.* at 583 ("Bait-and-switch practices can . . . tamper with the information flow and exploit the structure of the market.").

To be sure, Petitioners themselves disclaim any intent to "surprise consumers by waiting until the point of sale to inform them of the surcharge," Pet'r Br. 42, averring that they will, for instance, post a prominent sign indicating the existence of a credit-card surcharge. Pet. App. 15a-16a. But the implication of their argument is that the state cannot compel them to do so. The difference between a cash and credit price is the same regardless of whether a merchant surprises customers with its surcharge, and that mathematical

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[4] *See also* Dmitri Kuksov, *Buyer Search Costs and Endogenous Product Design*, 23 Marketing Sci. 490, 490-91 (2004) ("in the real world," buyers "must incur search costs to find the price of a product"); J. Yannis Bakos, *Reducing Buyer Search Costs*, 43 Management Sci. 1676, 1678-79 (1997) ("a buyer is required to pay a search cost to find the location [and] the price offered by some seller, and then decide[] whether to purchase one of the products already identified or keep searching").

equivalence, on Petitioners' theory, means that the situations are "equal in every way," Pet'r Br. 6, both to each other and to a system involving cash discounts.[5]

Thus, New York's surcharge ban is not about—or not *exclusively* about—how a price difference is "framed." Like its federal model, the law seeks to ensure, among other things, that "consumers cannot be lured into an establishment on the basis of the 'low, rock-bottom price' only to find at the cash register that the price will be higher if a credit card is used." S. Rep. No. 23, 97th Cong., 1st Sess. 4 (1981); *see* Resp't Br. 7-8, 12-13, 49-52. And it does so by regulating "a specific relationship between two prices," Pet. App. 21a, not by restricting speech.

II. THE SURCHARGE LAW CREATES, AT MOST, THE TYPE OF INCIDENTAL BURDEN ON SPEECH THAT IS TYPICAL OF MANY CONDUCT REGULATIONS

A. Although New York's surcharge ban regulates economic transactions rather than speech, this does not mean the law has *no* impact on the speech interests of merchants and customers, because "speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech." *R.A.V.*, 505

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[5] Petitioners make much of the psychological bias that causes people to respond more favorably to discount systems than to identically priced surcharge systems. This discussion is beside the point. That such a bias exists, and that credit-card companies prefer discounts for that reason, does not mean that it accounts for the *only* difference between the two systems. *See* Resp't Br. 34-35; *cf. Va. State Bd.*, 425 U.S. at 769 ("The advertising ban . . . affect[s] professional standards . . . *only* through the reactions it is assumed people will have to the . . . information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined." (emphasis added)).

U.S. at 389. Indeed, nearly every prohibition on conduct has the conceivable side effect of burdening speech in some way. But without more, the heightened judicial scrutiny appropriate for speech regulations is not triggered, for "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell*, 564 U.S. at 567.

If a merchant may not charge credit-card users more than the amount of an item's posted price, the merchant naturally will have no opportunity to tell customers that he or she is doing so, or why. *Cf. Williams*, 553 U.S. at 297 (the First Amendment does not protect "[o]ffers to engage in illegal transactions"); *Bates*, 433 U.S. at 384 ("Advertising concerning transactions that are themselves illegal obviously may be suppressed."). Arguably, therefore, merchants lose a communicative opportunity, a chance to "tell their side of the story about the cost of credit." Pet'r Br. 33. But the mere loss of that opportunity, resulting from a prohibition on economic conduct, does not call for treating the prohibition as a speech restriction. If it did, a vast range of laws limiting conduct would be subject to heightened First Amendment review. "Where the government does not target conduct on the basis of its expressive content," however, "acts are not shielded from regulation merely because they express [an] idea or philosophy." *R.A.V.*, 505 U.S. at 390. "That is why a ban on race-based hiring may require employers to remove 'White Applicants Only' signs, why 'an ordinance against outdoor fires' might forbid 'burning a flag,' and why antitrust laws can prohibit 'agreements in restraint of trade.'" *Sorrell*, 564 U.S. at 567 (internal citations omitted) (quoting *Rumsfeld*, 547 U.S. at 62; *R.A.V.*, 505 U.S. at 385; and *Giboney*, 336 U.S. at 502).

In other words, restrictions on conduct do not require heightened First Amendment review "whenever the person engaging in the conduct intends thereby to express an idea." *Mitchell*, 508 U.S. at 484 (quoting *O'Brien*, 391 U.S. at 376). Without implicating the First Amendment, therefore, a person can be prohibited from committing an assault, notwithstanding that he loses an opportunity to express his social attitudes through his choice of target. *Id.* And a person can be compelled to pay income taxes, notwithstanding that he loses an opportunity to "express his disapproval of the Internal Revenue Service by refusing to pay." *Rumsfeld*, 547 U.S. at 66. Here, it is doubtful that collecting a surcharge expresses any idea at all. *See* Section II.B.

Because surprising customers with a higher price at the point of sale "produce[s] special harms distinct from [any] communicative impact" it may have, *Roberts*, 468 U.S. at 628, the minor curtailment of merchants' speech opportunities that results from banning this practice "is plainly incidental to the [law]'s regulation of conduct." *Rumsfeld*, 547 U.S. at 62. And "even if enforcement of the Act causes some incidental abridgment of [Petitioners'] protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes." *Roberts*, 468 U.S. at 628. Section 518 is concerned with the "commercial aspect" of surcharges, *i.e.*, "with offerors communicating offers to offerees," not with the "substance of [any] information communicated" regarding the costs of credit payments or the evils of swipe fees. *44 Liquormart*, 517 U.S. at 499 (quoting *Linmark Assocs.*, 431 U.S. at 96); *cf. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) (height restriction on indoor advertisements for tobacco products "is an attempt to regulate

directly the communicative impact of indoor advertising" because it aims at limiting who can see and be influenced by the advertiser's message).

That is why Section 518, interpreted consistently with its federal predecessor, leaves merchants entirely free "to express whatever views they may have" on surcharges, discounts, swipe fees, the credit-card industry, or any other topic. *Rumsfeld*, 547 U.S. at 60. The law "neither limits what [merchants] may say nor requires them to say anything." *Id.* Merchants may post signs throughout their establishments calling attention to the evils of swipe fees; they may orally explain to each customer why those fees hurt businesses or cause them to raise prices; they may hand out slips of paper with every purchase setting forth their views on this score. Sellers that charge different prices for cash and credit transactions are not prevented from characterizing that difference in any way or with any label. Pet. App. 15a (the federal surcharge ban "could never be violated unless the seller 'tagged or posted' *a single price*" (emphasis added)). Thus, employees may refer to this price difference as a "surcharge," signs listing prices may do the same, and purchase receipts may even identify the precise amount of every surcharge, labeling it as such. There simply is "no basis," therefore, for concluding that Section 518 impedes any merchant's "ability . . . to disseminate its preferred views." *Roberts*, 468 U.S. at 627; *cf. Holder*, 561 U.S. at 25-26 ("plaintiffs may say anything they wish on any topic. They may speak and write freely . . . . Congress has not, therefore, sought to suppress ideas or opinions").

In sum, New York's law leaves merchants free to express any idea, on any topic, through any means, with one exception: they simply may not communicate to customers that persons using credit cards are being charged more for an item than its tagged price. There

are "no other restraints," Resp't Br. 20, and this lone impediment to merchants' expressive autonomy is incidental to the law's regulation of economic conduct.

B. Further, the communicative value of what Section 518 prohibits—imposing a surcharge—is "attenuated at best." *Roberts*, 468 U.S. at 627.

What message is actually conveyed when a merchant adds a surcharge to a credit-card purchase? Petitioners say that this "informs consumers about the cost of credit cards." Pet'r Br. 27-28. But what exactly does that mean?

At times, Petitioners suggest that the law prevents them from communicating "the price difference" between cash and credit purchases, *i.e.*, the fact that customers "are paying *more* to pay with credit." Pet'r Br. 1; *see id.* at 20 (Petitioners "all want the same thing: to truthfully tell their customers that there is an 'additional fee' or 'surcharge' for using credit"). That suggestion is wrong, at least when Section 518 is interpreted like its federal counterpart. A seller offering different cash and credit prices is not prohibited from informing customers what those prices are; the law in no way restricts disseminating "information as to who is charging what." *Va. State Bd.*, 425 U.S. at 764.

Moreover, a seller may characterize the cash/credit price difference "as whatever it wants," including as a "surcharge," and still "would *not* be violating Section 518." Pet. App. 22a. A violation occurs, rather, only if the price charged to a customer is higher than the item's single tagged price. So long as that does not happen, "Section 518 does not prohibit sellers from referring to credit-cash price differentials as credit-card surcharges, or from engaging in advocacy related to credit-card surcharges." *Id.* at 20a.

Elsewhere, Petitioners suggest that they need to impose surcharges in order "to inform consumers *why* credit is expensive—for what reason they charge more for using a credit card." Pet'r Br. 33 (emphasis added and quotation marks omitted). Again, this is not true. Imposing a surcharge on credit-paying customers informs them of one thing only—that the merchant has decided to charge more for credit payments. It says nothing about *why*. It provides no information about the nature or even existence of credit-card swipe fees, nor does it explain that sellers impose surcharges on customers to recoup the costs of those fees—as opposed to, say, the costs of maintaining equipment that can process the payments. If any of this is conveyed to customers, it is conveyed separately, through actual speech by merchants—like a sign posted at the counter informing customers that, "due to the high swipe fees charged by the credit-card industry, we would charge them 3% more for using a credit card." J.A. 60 (declaration of Linda Fiacco, co-owner of Expressions Hair Design). Thus, any expressive component of a surcharge, insofar as it relates to why merchants charge more for credit, "is not created by the conduct itself but by the speech that accompanies it." *Rumsfeld*, 547 U.S. at 66; *see* Resp't Br. 36-38.

As this Court has explained, "[t]he fact that such explanatory speech is necessary is strong evidence" that an act "is not so inherently expressive that it warrants protection," even as expressive *conduct*. *Rumsfeld*, 547 U.S. at 66 (citing *O'Brien*, 391 U.S. 367). Moreover, the same explanatory speech—including the information and sentiments contained in the sign referenced above—may be freely provided without violating the surcharge ban. Nothing "prevents the speaker from conveying, or the audience from hearing, these . . . messages, and nothing in the nature of

things requires them to be combined" with the act of charging more than a posted price. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989).

C. What, then, of Petitioners' claim that surcharges are the "most effective means" of drawing customers' attention to "the cost of credit"? Pet'r Br. 7. Given the surprise and anger that customers may experience when they are charged more for an item than the amount posted, imposing a surcharge might indeed be a powerful method of highlighting the price difference between cash and credit, encouraging customers to switch payment methods. But even if that is true, foreclosing this particular mode of raising awareness remains an incidental burden of a regulation on conduct.

Sometimes the most effective way to draw attention to a message is not through speech at all, but rather through action calculated to obstruct, annoy, harass, or even injure. But this Court's decisions reject the "view that an apparently limitless variety of conduct can be labeled 'speech,'" or protected as such, whenever an underlying goal of the conduct is to "express an idea." *Mitchell*, 508 U.S. at 484 (quoting *O'Brien*, 391 U.S. at 376).

A powerful way to demonstrate one's opposition to traffic laws, for instance, would be to terrorize pedestrians and motorists by recklessly violating those laws, but "[o]ne would not be justified in ignoring the familiar red light because this was thought to be a means of social protest." *Cox v. State of La.*, 379 U.S. 536, 554 (1965). Ensuring a captive audience for one's speech through physical restraint would be an effective means of making oneself heard, but "demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Id.*

at 555. For the prejudiced businessman, there could be few more powerful means of making others aware of his views than flouting civil rights laws by discriminating in employment, but this "hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld*, 547 U.S. at 62.[6]

The potency of such actions in calling attention to the actor's grievance does not transform them into protected speech, nor insulate them from laws that guard against the harms they cause. Just as a protestor may carry a sign but not hit passersby on the head with it to get their attention, merchants may advocate to customers regarding the costs of credit but may not inflict the harm of imposing a surcharge to drive the point home.

III. PETITIONERS' ARGUMENT WOULD INVITE A HOST OF LEGAL CHALLENGES TO BUSINESS REGULATIONS THAT HAVE ONLY AN INCIDENTAL EFFECT ON SPEECH, IMPROPERLY SUBJECTING A LARGE SWATH OF LAWS TO HEIGHTENED FIRST AMENDMENT SCRUTINY

A. Petitioners' theory of the First Amendment, if accepted, threatens to upend settled understandings of

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[6] The courts have seen attempts to misuse the First Amendment in ways that mirror these illustrative examples. For instance, the owner of a California restaurant defied a state ban on the sale of foie gras by serving it at his restaurant, accompanied by a "protest card" that explained his "criticism of and opposition to" the ban. After being sued for unfair competition, he argued that his conduct was "in furtherance of the exercise of . . . the constitutional right of free speech," because it demonstrated his "public opposition to the foie gras ban." *Animal Legal Def. Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1275-77 (2015).

the distinction between constitutionally protected speech and unprotected conduct, requiring courts to apply heightened scrutiny to laws that impose only incidental burdens on speech. Compromising that distinction would diminish the elected branches' ability to legislate in areas "traditionally subject to government regulation," *Lorillard Tobacco*, 533 U.S. at 554, eroding the "paramount" power they historically have held over "their domestic economy." *Giboney*, 336 U.S. at 504, 497. "[S]ubject[ing] every incidental restraint to First Amendment scrutiny . . . would require subjecting an enormous range of laws to a constitutional balancing analysis. . . . [O]veruse of First Amendment scrutiny would trivialize the significance of applying First Amendment protections." Srinivasan, *supra*, at 405, 406.

As discussed below, subjecting laws like Section 518 to the heightened scrutiny that governs restrictions on speech, commercial or otherwise, risks enmeshing the nation's courts in assessing the wisdom of a vast range of regulatory measures. Apart from aggrandizing the role of the judiciary, the consequence may be a watering down of the standards that apply to genuine commercial speech restrictions, jeopardizing the protections of the First Amendment.

Attempting to dispel these concerns, Petitioners assert that their effort "in no way threatens the bedrock proposition that states have broad authority to regulate economic conduct, unencumbered by the First Amendment." Pet'r Br. 35. Their assurances, however, boil down to a declaration that states like New York remain free to enact more drastic economic regulations than the ones they have selected (such as "eliminat[ing] dual pricing altogether"), and an unsupported claim that their victory would have little impact beyond the realm of credit-card surcharges. *Id.*

Despite these protests, it is unclear how the "speech" sought to be protected here can be meaningfully distinguished from various other forms of economic conduct regulated outside the First Amendment. Indeed, Petitioners' arguments introduce shaky and potentially unsustainable boundaries between the allegedly protected speech for which they seek protection and conduct that they concede the government may proscribe.

Petitioners' theory, for instance, calls into question laws that regulate prices in relative terms. As explained earlier, New York's surcharge ban is drafted as an economic regulation governing the prices charged in sales transactions. But Petitioners argue that the ban lacks any significance beyond labels (and thus restricts speech) because merchants can vary the price against which a surcharge is defined. In essence, because a sticker price theoretically can be adjusted at will, Petitioners argue that New York may not define the amount of an illegal surcharge by reference to a sticker price.

At the same time, however, Petitioners offer reassurance that under their theory the First Amendment still allows states to "regulate the amounts merchants charge for cash versus credit." *Id.* In other words, they say a state can limit the amount by which a credit price is higher than a cash price, for instance by declaring that the difference may not exceed 2%, or even by "eliminat[ing] dual pricing altogether." *Id.* But if a state can limit the relative difference between two prices in that way, what stops it from doing what New York has done here—declaring that when an item has a sticker price, the amount by which this price may be increased for credit purchases is 0%? As this illustrates, there is a shaky line, at best, between the activity that Petitioners argue is safeguarded by the

First Amendment and the "economic conduct" that they aver may be freely restricted. *Id.*

Nor are the implications of this theory limited to credit-card surcharges; they seemingly threaten any price regulation that functions in relative, as opposed to absolute, terms. An obvious example is noted in the decision below: Based on a history of episodes in which businesses price-gouged citizens for needed goods during shortage crises, New York has outlawed the practice, declaring that "[d]uring any abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety and welfare of consumers, no party . . . shall sell . . . any such goods or services . . . for an amount which represents an unconscionably excessive price." N.Y. Gen. Bus. Law § 396-r. Before the Second Circuit, Petitioners "appear[ed] to concede that laws against price-gouging . . . do not implicate the First Amendment." Pet. App. 27a n.10. But such laws depend on the existence of a standard price for an item or service, against which an "excessive" price is measured—and it is difficult to see "how a seller's normal price for the purpose of anti-price-gouging laws is meaningfully different from its sticker price for the purpose of Section 518." *Id.*; *see* Resp't Br. 24-25 (citing other economic regulations that "us[e] a seller's regular price as a benchmark, and dictat[e] how a seller may adjust that price").

Or as another example, consider recent federal legislation meant to prevent abuses by credit-card companies. One part of this legislation prohibits "increas[ing] any annual percentage rate" on a credit-card account except under specified conditions. 15 U.S.C. § 1666i-1(a). Under this provision, bumping a customer's annual interest rate from 5% to 20% could be illegal, notwithstanding that the company was free to charge a 20% interest rate when it first issued the

card, or that it remains free to charge a 20% rate to new customers. The legality of a 20% interest rate is thus determined relative to the original rate offered by the company, not in isolation. New York's surcharge law regulates prices in the same manner.

The potential implications of Petitioners' argument are broader still, suggesting that even contract enforcement and promissory estoppel rules implicate First Amendment concerns and are subject to challenge on that basis. A person can be legally sanctioned for conduct that violates a contractual obligation, notwithstanding that the obligation exists in the first place only because of an earlier promise that was communicated through speech. That situation resembles the one here: liability is triggered by charging customers a particular amount—an act, not speech—but the obligation not to charge that amount arises only because of an earlier "promise" made to customers in the form of a posted price.

The Solicitor General sees things this way: Although Section 518 "nominally" prohibits transactions that exceed a posted sticker price, the Solicitor General's brief argues, the law has the effect of reaching back to influence the "manner in which the 'sticker price' conveys the merchant's pricing scheme" in the first place. U.S. Br. 19. The brief then hastens to add, without elaboration, that Section 518 nevertheless is not like "a law that temporarily prohibited a merchant from altering previously offered prices," which could "be analogized to contract law." U.S. Br. 20. As discussed above, though, this is *exactly* the role of the surcharge ban—prohibiting merchants from increasing previously offered prices. This attempt to portray Section 518 as inhabiting a world unto itself actually shows just how difficult that endeavor is, highlighting

the formidable line-drawing challenges that would follow from treating it as a speech regulation.

B. In numerous contexts, legal consequences flow from statements, promises, offers, or disclosures of information, but that alone has never been held to require First Amendment scrutiny. Settled law in those areas could be called into doubt by what Petitioners seek—a pronouncement that surcharge bans demand heightened scrutiny merely because the manner in which a merchant advertises its prices can be the reason a subsequent transaction is deemed illegal. The unmooring of that settled law could vastly expand judicial second-guessing of legislative choices.

Laws against fraud, for instance, are not analyzed under the First Amendment merely because fraud is accomplished through speech. *See Alvarez*, 132 S. Ct. at 2547 ("Where false claims are made to effect a fraud . . . it is well established that the Government may restrict speech without affronting the First Amendment."); *Va. State Bd.*, 425 U.S. at 771 (same). Antitrust laws "can prohibit 'agreements in restraint of trade'" without being deemed speech restrictions. *Sorrell*, 564 U.S. at 567 (quoting *Giboney*, 336 U.S. at 502). The "exchange of information about securities" may be regulated without provoking First Amendment scrutiny, *see Ohralik*, 436 U.S. at 456, as can "employers' threats of retaliation for the labor activities of employees." *Id.* (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)). Unauthorized sharing of classified information may be punished, *cf. R.A.V.*, 505 U.S. at 389 ("a law against treason . . . is violated by telling the enemy the Nation's defense secrets"), and the government may enforce the confidentiality of grand jury records, *see Douglas Oil Co. of Calif. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979) ("We consistently have recognized that the proper functioning of our grand

jury system depends upon the secrecy of grand jury proceedings."). As these examples illustrate, many human endeavors are accomplished through speech or information sharing, yet "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik*, 436 U.S. at 456.

If courts are called upon to begin scrutinizing such regulations under heightened First Amendment review, the result could be a wholesale shift in the judiciary's capacity to second-guess the decisions of elected representatives. The fact that economic transactions are "linked inextricably" to related commercial speech, *Edenfield*, 507 U.S. at 767, means that regulation of those transactions, in particular, will often be subject to creative recasting as speech restrictions.

In such cases, moreover, courts may increasingly be asked to predicate First Amendment doctrine on contested theories of economic reality. Here, for instance, the argument that New York's law is a covert speech restriction hinges entirely on the proposition that there are no meaningful economic differences between surcharge and discount systems, and that "[l]iability thus turns on the speech used to describe identical conduct." Pet'r Br. 1-2. That proposition, at a minimum, is debatable: only surcharge systems enable mid-transaction price increases, which exploit the intuition that a customer who has sunk time and effort pursuing a transaction is less likely to back out and begin anew, even if terms become less favorable. And indeed, one can find literature affirming the reality of the "search costs" that shoppers inevitably incur, and the economic significance of their efforts to reduce those costs. *See supra* at 12-13. Which appraisal of economic reality is more compelling, therefore—one

that accounts for these search costs and consumers' attempts to minimize them, or one that instead emphasizes the mathematical equivalence of surcharges and discounts? Such judgments are within the province of the legislative branches, and not meant to be constitutionalized as a matter of First Amendment doctrine.

Calls to indulge in legislative second-guessing are also evident in the efforts of Petitioners' *amici* to persuade this Court that surcharge bans are simply bad policy—harming consumers, favoring the well-off over the poor, allocating costs inefficiently, or draining the national economy. But these *policy* considerations are irrelevant to the *constitutional* question, for "it is not [this Court's] function to weigh the policy arguments on either side of the nationwide debate" over the merits of credit-card surcharges. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 187 (1999); *see Glickman*, 521 U.S. at 474 (the debatable "wisdom of such a program" is "insufficient to warrant special First Amendment scrutiny"). While opponents of New York's surcharge ban decry its alleged paternalism, "it would also be paternalism for [this Court] to prevent the people of the States from enacting laws that [it] considers paternalistic, unless [the Court] ha[d] good reason to believe that the Constitution itself forbids them." *44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring in part and concurring in the judgment).

C. In the end, one casualty of these developments may be the "the force of the Amendment's guarantee," *Ohralik*, 436 U.S. at 456, with respect to speech of all kinds.

If a decision here has the effect of muddying the distinctions long thought to separate restrictions on speech from regulations of economic conduct, then—as noted—courts may find themselves compelled to apply heightened First Amendment scrutiny to all manner

of economic regulations that incidentally affect speech in some way. But in the process of upholding innocuous regulatory measures that only minimally bear on traditional free speech values, these courts might come to require less robust showings from the government in justification of those measures. Consciously or not, courts might come to demand less compelling showings of a governmental interest, for example, or less precision in the means used to advance it. And thus, by diminishing the standards that apply more broadly to protect many types of vital speech, the result could be a "dilution, simply by a leveling process, of the force of the Amendment's guarantee." *Bd. of Trs.*, 492 U.S. at 481.

This risk is particularly acute given the uncertain future of the distinction between commercial and non-commercial speech. The approach of "accord[ing] less protection to commercial speech than to other expression . . . . has been subject to some criticism," *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001), and certain *amici* urge the Court to use this case to reject that distinction. Indeed, if Petitioners' arguments are taken seriously, there seems no principled basis to conclude that New York's law should not be required to survive the highest form of First Amendment scrutiny. *Compare Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015) ("Because the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny . . . ."), *with* Pet'r Br. 33 ("New York's law goes even beyond mere content discrimination, to actual viewpoint discrimination." (quotation marks omitted)). If such arguments prevail, laws that have as minor and incidental an effect on speech interests as this one would be required to withstand strict

scrutiny—a result that "trivializes the freedom" vindicated by this Court's commercial speech cases. *See Rumsfeld*, 547 U.S. at 62.

In that world, where commonplace economic regulations are held up to the most stringent form of First Amendment scrutiny, a dilution of the standards applied to speech restrictions is all the more conceivable. The ironic result would be a diminishment of the First Amendment as a genuine source of liberty.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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EXPRESSIONS HAIR DESIGN, ET AL.,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF NEW YORK, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FLORIDA, NINE OTHER STATES, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Benjamin Levinger & Michael A. Zabek, *Credit or Debit: How Do Lower-Income Consumers Pay?*, 22 Communities & Banking 9 (2011) 32

Bill to Ban Surcharges on Credit Card Purchases Approved by Assembly Panel, The Jersey Journal (Feb. 7, 2013) 20

Credit Card Surcharges? No Way, Poll Says, CreditCards.com (Aug. 16, 2012) 20

Credit or Debit Card Interest, Surcharges and Fees 2013 Legislation, Nat'l Conf. of State Legislatures (July 15, 2013) 12

Drazen Prelec & Duncan Simester, *Always Leave Home Without It: A Further Investigation of the Credit-Card Effect on Willingness to Pay*, Marketing Letters 12(1) 5 (2001) 19

H.R. Comm. on Commerce, H.B. 448 Staff Analysis (Fla. 1987) 15, 16, 18, 20

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Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2009)..... 9

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INTEREST OF *AMICI*

This case involves a challenge to the constitutionality of a New York law prohibiting sellers from imposing certain credit-card surcharges on their customers. Ten states and the Commonwealth of Puerto Rico have enacted such statutes,[1] and more than 20 other states have considered adopting some such ban in the last three years alone. In addition, the novel theory underlying petitioners' free-speech claim threatens to cast a cloud of doubt on a broad range of valuable state statutes. Accordingly, *amici* states have a substantial interest in the Court's disposition of this case.

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[1] Cal. Civ. Code § 1748.1(a); Colo. Rev. Stat. § 5-2-212; Conn. Gen. Stat. § 42-133ff; Fla. Stat. § 501.0117; Kan. Stat. Ann. § 16a-2-403; Me. Rev. Stat. Ann. tit. 9-A, § 8-509; Mass. Gen. Laws ch. 140D, § 28A; N.Y. Gen. Bus. Law § 518; Okla. Stat. tit. 14a, §§ 2-211, 2-417; P.R. Laws Ann. tit. 10, §§ 11, 12; Tex. Fin. Code Ann. § 339.001.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners challenge the constitutionality of a New York law prohibiting retail businesses from imposing certain credit-card surcharges on their customers. Of particular relevance, petitioners contend that the law impermissibly prevents them from engaging in truthful speech about lawful pricing conduct. In order to resolve petitioners' constitutional claims, this Court must address an antecedent question of statutory interpretation: Does Section 518, properly construed, bar petitioners from doing what they say they want to do? In this Court, as in the proceedings below, petitioners insist that ancillary disputes concerning the meaning of state law be resolved *against* them—that is, they ask this Court to rule that state law does not let them speak as they would like.

That is odd; litigants generally do not go out of their way to undermine the interests they say they seek to vindicate, and nothing prevents petitioners from arguing in the alternative. At any rate, this Court should not be so quick to assume that New York law suppresses petitioners' speech. Indeed, from the perspective of *amici* states, the most important question in this case is not whether the challenged ban on credit-card surcharges will be upheld, but whether the federal courts will continue to exercise appropriate caution in considering constitutional challenges to state statutes. Accordingly, *amici*'s submission to this Court is a modest one, and it should be uncontroversial: State laws restricting credit-card surcharges, like state and federal statutes in general, should be

presumed valid, construed with care, and struck down only as a last resort.

Petitioners' approach here does not come close to complying with those important and well-established principles of constitutional adjudication. Petitioners ask this Court to hold that New York's law has the purpose and effect of regulating speech; but the text of that law says nothing about speech, and traditional tools of statutory interpretation do not support—much less compel—the conclusion that the state's narrow regulation of pricing conduct limits a seller's freedom to disseminate ideas. Petitioners assert that New York's law does not serve *any* legitimate governmental interests; but countless state and federal lawmakers have concluded otherwise—finding that such laws protect consumers from deceptive and unfair pricing practices, enhance market efficiency by facilitating price comparisons, and promote economic dynamism by encouraging the use of credit. Finally, petitioners fault the Court of Appeals for declining to resolve a disputed issue of state law. But a federal court does not "shirk its obligation to fully adjudicate the case," Pet. Br. 45, when it asks if there is any reasonably available alternative to invalidating a duly-enacted state statute. As the Court of Appeals recognized, several viable alternatives are present here.

In the view of *amici* states, this Court should accept respondents' submission that the law they are charged with enforcing is most reasonably construed to allow truthful speech concerning concededly lawful pricing conduct. Respondents' approach, unlike petitioners', gives effect to the commonly understood

distinction between surcharges and discounts, advances the governmental interests supporting anti-surcharge statutes, protects rather than undermines the right to free speech, and does not needlessly cast a cloud of doubt on a broad range of valuable state and federal laws not heretofore subject to heightened constitutional scrutiny.

At a minimum, however, this Court should reject petitioners' view that the federal judiciary must take the initiative to construe state law in such a way as to create rather than avoid constitutional concerns. Consistent with longstanding prudential doctrines informing the exercise of judicial review, abstention or certification can and should be used to clear up any constitutionally meaningful ambiguities in New York's statute before that law is struck down. In other words, it may or may not make sense for petitioners to argue that state law should be read to limit their right to speak; and the state judiciary may or may not accept that argument at the end of the day; in the meantime, however, the federal courts need not and should not be complicit in the gratuitous distortion and invalidation of state law. Such restraint is particularly appropriate where, as here, the statute in question says nothing about speech and is most reasonably interpreted not to invade protected rights.

ARGUMENT

I. CREDIT-CARD SURCHARGES AND CASH DISCOUNTS ARE ECONOMICALLY AND CONSTITUTIONALLY DISTINGUISHABLE.

Petitioners argue that New York's surcharge law must target speech because, insofar as it purports to

regulate pricing conduct, it draws a distinction without an economic difference. In particular, petitioners contend that a credit-card surcharge and a cash discount "are just two ways of framing the same price information." Pet. Br. 1. Because laws like Section 518 do not meaningfully limit what they may *do*, petitioners argue, the purpose and effect of such laws must be to limit what they may *say*.

The premise of that argument is wrong. The critical difference between surcharges and discounts hinges on their opposing relationships to a default value—the regular price. While this default value is set by merchants rather than the state, and merchants theoretically may adjust it in response to anti-surcharge laws, legal and practical considerations limit their ability to do so. Because of these constraints, anti-surcharge laws that allow cash discounts often will have the effect not only of prohibiting surcharges, but also of nudging merchants to keep their regular prices low—a dynamic that petitioners largely overlook in arguing that regular prices are an illusory benchmark.

In short, credit-card surcharges and cash discounts are two different pricing practices; those practices need not lead to the same result; and, even when they do, the alternative ways of getting to that result involve economically significant differences tied to real-world conduct that the states have a right to regulate. A few hypotheticals may help to illustrate those points.

Price ceilings and freezes. Laws imposing price ceilings or prohibiting certain price increases

may make it impossible for a seller to attempt to circumvent a ban on credit-card surcharges by raising prices and then allowing cash discounts. *E.g.*, Fla. Admin. Code R. 15B-9.010 (providing for the setting of maximum rates for vehicle towing and storage); N.Y.C. Admin. Code § 26-501 *et seq.* (rent control law). Suppose, for example, that a preexisting law prohibits certain price increases at the time that a ban on credit-card surcharges is enacted; and suppose also that a particular seller had been charging all customers the same price, regardless of method of payment. If such a seller decided to create a new price differential between credit-card sales and other transactions, he could start giving discounts to cash-paying customers. But he could not increase the regular price he had previously been charging to any customer. Instead, he would have to charge cash-paying customers less than before. Thus, and even assuming all other variables (*e.g.*, the total number of sales, the proportion of sales involving cash-paying customers) could somehow be held constant, a new allowance for cash discounts would not raise the price paid by credit-card customers, and a seller offering such a cash discount would make less profit than would otherwise be the case.

Low-priced items. Alternatively, consider the situation of a single-sticker-price merchant who sells goods for a list price that is lower than the amount of the swipe fee incurred when such goods are purchased by credit card. Say, for example, that the cost of an item is 50 cents, and the swipe fee is one dollar. If a surcharge ban applies, a merchant seeking to pass on the one-dollar swipe fee to credit-card customers could not keep the single-sticker price at 50 cents and raise the price for credit-card-paying customers to

$1.50. Nor could the merchant get to the same result just by giving cash discounts of one dollar from that point on. Without an accompanying one-dollar increase in the tagged price, a store offering one-dollar cash discounts would not only fail to recover the cost of the swipe fee; it would also have to pay customers using cash 50 cents per unit for the privilege of "purchasing" the item in question.

Merchants accepting multiple credit cards, with different swipe fees. Next, consider a merchant who contracts with different credit-card companies imposing different swipe fees. *See* Resp. Br. 37 (noting that "merchant fees . . . vary widely for each credit-card transaction") (citing J.A. 60; U.S. Br. 2). For example, suppose that Bank 1 imposes a swipe fee of 50 cents per transaction, while Bank 2 imposes a swipe fee of 75 cents per transaction. A law barring credit-card surcharges typically would not permit the merchant to sell a product with a single-sticker price of one dollar by charging $1.00 per unit to cash-paying customers, $1.50 to customers using a credit card issued by Bank 1, and $1.75 to customers using a card issued by Bank 2. After all, such a practice would impose penalties on credit-card-paying customers by requiring them to pay amounts over and above the regular price.

The seller could try to get around the law prohibiting credit-card surcharges by increasing list prices and then allowing cash discounts, but doing so would be tricky. Should prices be raised by 50 cents, 75 cents, or some other amount? Similarly, should the corresponding cash discount be 50 cents per unit, 75 cents per unit, or something in between? A merchant

allowed to impose credit-card surcharges could keep things simple—and rake in some additional profit to boot—by imposing on *all* credit-card paying customers the maximum swipe fee it is charged, even if that fee applies only to *some* card-paying customers. *See* Todd J. Zywicki, *The Economics of Payment Card Interchange Fees and the Limits of Regulation* 38–39 (ICLE Financial Regulatory Program White Paper Series) (June 2, 2010) (reporting that some merchants impose credit-card surcharges higher than the amount of the swipe fee).[2] But a merchant considering whether to adopt a cash-discount scheme might be reluctant to give *all* cash-paying customers a discount greater than the amount of *some* swipe fees, particularly if such largess yields a net loss to the merchant. In other words, a surcharge ban might make a seller less likely to engage in differential pricing than would otherwise be the case; and, even if a seller subject to a surcharge ban chooses to put a discriminatory pricing scheme in place, the surcharge ban might give him greater incentive to err on the side of minimizing the value of the cash discount (and, thus, the amount of the price differential) in order to protect his bottom line.

Default rules matter. As those hypotheticals illustrate, a seller may not compensate for a ban on credit-card surcharges, even if the relevant state law allows cash discounts, without first increasing the regular or default price. The practical implications of that economic fact of life are not limited to the particular scenarios discussed above. In the real world, any

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[2] *Available at* www.mercatus.org/system/files/zywicki_interchange.pdf

number of considerations may prevent or discourage a seller from adopting across-the-board increases in regular or list prices, even when (as is not always the case) it is possible to do so. *See* S. Rep. No. 97-25, at 3 (1981), *as reprinted in* 1981 U.S.C.A.N.N. 74, 76 ("recogniz[ing] that while discounts for cash and surcharges on credit cards may be mathematically the same, their practical effect and the impact they may have on consumers is very different").

One such consideration is inertia. As everyday experience teaches, choosing one default rule over another—for example, adopting a policy that requires disinterested parties to opt out instead of requiring interested parties to opt in—can have a significant impact on behavior, even when both default rules permit the same range of outcomes. *See generally* Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2009). To the extent that laws like Section 518 allow cash discounts while disallowing credit-card surcharges, such laws may reflect a reasonable legislative determination to gently "nudge" merchants in the direction of price uniformity by subjecting them to a default rule that permits but subtly discourages discriminatory pricing schemes.

Another, and perhaps more powerful, disincentive is the fear of price competition. *See* Resp. Br. 32–33. Every business owner knows that consumers respond to changes in posted prices. Accordingly, single-sticker-price sellers contemplating the creation of a price differential might reasonably fear that some customers will flee if the list price goes up. That fear may be particularly acute if the newly-changed list

price is higher than the regular price advertised by competitors. And, to the extent that increases in posted prices result in reduced clientele, sellers may not be able to get to the same economic result via cash discounts as they do by means of credit-card surcharges.

Finally, and even assuming that cash discounts and credit-card surcharges may sometimes be used to get to the same result, that does not mean that laws prohibiting credit-card surcharges have the practical effect of regulating speech. One may as well say that a town restricts speech if it shuts down one road while keeping another open, and both roads go from point A to point B. A driver is still free to take the open road to his destination, he is still free to criticize the road closure, and he may even choose—though it is hard to see why he would—to use the name of the closed road when talking about the open road. What he may not do is take the road that has been closed. The only difference between that hypothetical and the case at hand is that, in this case, it is far from clear that the two roads in question may be used to get to the same place.

In sum, cash discounts and credit-card surcharges are readily distinguishable pricing practices. The distinction between surcharges and discounts does not evaporate whenever state law allows sellers to create price differentials without imposing "surcharges" within the meaning of a particular state statute. Even when state law allows cash discounting, a seller cannot get around a credit-card surcharge ban just by using different labels. Instead, the seller must engage in conduct—raising the regular price, and

then offering a cash discount—at which many merchants may balk. At any rate, a state legislature could reasonably conclude that laws like Section 518 are likely to have a salutary effect on economic conduct traditionally subject to regulation by the states.

II. STATE STATUTES PROHIBITING CREDIT-CARD SURCHARGES SERVE LEGITIMATE GOVERNMENTAL INTERESTS UNRELATED TO THE SUPPRESSION OF IDEAS.

According to petitioners, laws like Section 518 were enacted solely at the behest of powerful interest groups, cannot reasonably be thought to advance legitimate economic or consumer-protection goals, and have the sole aim of silencing protected speech. *See* Pet. Br. 8–16, 26, 37–41. That dark and one-sided narrative helps to set up petitioners' constitutional claim: If statutes prohibiting credit-card surcharges are nothing more than a sinister plot to suppress speech,[3] courts might be inclined to strike them down even though, as some lower courts have recognized, such laws need not be read to invade protected rights.

The truth about surcharge statutes is much more complex than petitioners allow. Some consumer-protection groups, retail associations, and scholars support such laws; others do not. Some state legislatures, after protracted consideration and vigorous

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[3] *See, e.g.*, Pet. Br. 8 ("Over the years, the credit-card industry has succeeded . . . in silencing merchants' attempts to call consumers' attention to the true costs of credit."); *id.* at 15 ("This time, the industry's lobbying was largely covert. To give the illusion of grassroots support, American Express and Visa went so far as to create and bankroll a fake consumer group . . . .").

legislative debate, have determined that surcharge bans help to effectuate important economic policies; other states, after equally careful consideration, have concluded that such laws do not serve the public interest. Congress enacted a nationwide anti-surcharge law that many states, including New York, treated as a model of regulation in this area. Then, after eight years of study and experience, Congress changed its mind, or at least allowed the federal statute to expire. Finally, many state legislatures apparently assumed that anti-surcharge legislation was inappropriate or unnecessary in light of overlapping laws and private contractual arrangements between banks and retailers; other states—as many as 23 states in the last three years alone—have considered enacting their own bans in order to fill the gap left by the expiration of the former Truth in Lending Act ("TILA") and recent changes to private agreements between banks and retailers.[4]

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[4] Arkansas, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maryland, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, New Jersey, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin all introduced anti-surcharge bills during their 2013 legislative sessions. *See* Credit or Debit Card Interest, Surcharges and Fees 2013 Legislation, Nat'l Conf. of State Legislatures (July 15, 2013), http://www.ncsl.org/research/financial-services-and-commerce/credit-or-debit-card-surcharges-2013-legis.aspx (compiling a summary of 44 surcharge bills introduced in multiple state legislatures during the 2013 legislative session). Two of those states, Mississippi and Utah, passed such laws.

As that summary suggests, reasonable people can and do disagree on whether credit-card surcharges should be banned. This Court need not resolve that robust and ongoing debate concerning a complicated question of public policy. As the expiration of the former TILA makes clear, the industry forces purportedly responsible—according to petitioners—for the enactment of such bans (*see* Pet. Br. 8–16) do not always get their way, and the political process is adequate to the task of accommodating competing points of view on this issue.

In assessing petitioners' constitutional challenge, however, this Court should not lightly assume that New York's elected legislators enacted a law that "doesn't directly advance *any* interest in consumer welfare," Pet. Br. 26 (emphasis added). As explained below, countless state and federal lawmakers have concluded that statutes very much like, and in some cases just like, Section 518 serve legitimate governmental interests wholly unrelated to the suppression of ideas. Three interests in particular warrant consideration.

A. Protecting Consumers from Deceptive and Unfair Pricing Practices

In prohibiting credit-card surcharges, Congress sought, *inter alia*, to make sure that merchants "cannot implement two-tier pricing systems which deceive or mislead the consumer." S. Rep. No. 97-25, at 4, *as reprinted in* 1981 U.S.C.A.N.N. at 77. States enacting similar bans have likewise emphasized that consumer-protection objectives, including the goal of avoiding unfair surprises. The sponsor of Texas's law,

for example, explained that "the statute protects consumers from surprise." Sponsor's Statement of Intent, S.B. 641, 84th Leg., R.S. (Tex. 2015) ("the statute protects consumers from surprise"); *see* Hearings on H.B. 1558 Before the House Comm. on Fin Insts., 69th Leg. R.S. (Tex. Apr. 22, 1985) ("[U]ntil the federal government places a permanent ban on [credit-card surcharges], I believe it is in our best interest to protect the consumer.").

Of particular interest here, state and federal lawmakers have found that substantial consumer-protection benefits flow from bans on credit-card surcharges even when the law in question allows discounts for other methods of payment. For example, Congress initially distinguished between surcharge and discount pricing systems in order to ensure that consumers are not subjected to paying "additional amount[s] above the seller's price." Pub. L. No. 94-222, 90 Stat. 197 (1976). Similarly, California's statute was enacted to "protect consumers from deceptive price increases for goods and services by prohibiting credit card surcharges *and* encouraging the availability of discounts by those retailers who wish to offer a lower price for goods and services purchased by some form of payment other than credit card." Cal. Civ. Code § 1748.1(e) (emphasis added).

Legislatures enacting credit-card surcharge bans have identified a variety of ways in which such laws serve to deter and prevent unfair and deceptive business practices. The following discussion addresses two important examples.

Bait-and-switch schemes. Legislatures enacting credit-card surcharge bans have sought to ensure that "consumers cannot be lured into an establishment on the basis of the 'low rock-bottom price' only to find at the cash register that the price will be higher if a credit card is used." S. Rep. No. 97-25, at 4, *as reprinted in* 1981 U.S.C.A.A.N. at 77. As Congress recognized, the federal ban on credit-card surcharges addressed that problem because it tended "to assure that consumers will be seeing at least the highest possible price they will have to pay when they see a tagged or posted price," *id.* Here too, states sought to address the same problem. For example, when Florida adopted its anti-surcharge law, the legislature explained that the bill would "benefit . . . consumer[s]" by ensuring that merchants and lessors did not "increas[e] the sales price" "at the time of payment solely for the user of the credit card." H.R. Comm. on Commerce, H.B. 448 Staff Analysis, at 3 (Fla. 1987) ("Fla. H.B. 448 Staff Analysis"); *cf.* S.B. 470, 27th Leg. (Haw. 2013) ("find[ing] . . . that surcharges also create the potential for abuses by retailers since the assessment of a surcharge or amount of a surcharge is not always clear to consumers").

Windfall profits. State legislatures could also reasonably conclude that, absent laws like Section 518, some merchants will use credit-card surcharges to collect windfall profits from consumers. *See, e.g.*, Steven Semeraro, *Assessing the Costs & Benefits of Credit Card Rewards: A Response to Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, 25 Loy. Consumer L. Rev. 30, 83 (2012). Most sellers have already incorporated swipe fees into

their regular prices. Absent laws prohibiting credit-card surcharges, those merchants could "begin to charge consumers twice for the [same] fee." *New Credit Card Transaction Fees: List of States Charging 4% Surcharge 'Checkout' Fee*, International Business Times (Jan. 18, 2013).[5] Even worse, merchants seeking to recover such windfall profits could shift the blame for their duplicative or exorbitant surcharging practices to credit-card companies. *See* Richard A. Epstein, *The Regulation of Interchange Fees: Australian Fine-Tuning Gone Awry*, 2005 Colum. Bus. L. Rev. 551, 584 (2005) (observing disproportionate rise in credit-card surcharges in Australia, where surcharges are legal, well above merchants' swipe fees, and suggesting price discrimination against cardholders).

Over a long stretch of time, proponents of surcharge bans have expressed particular interest in protecting especially vulnerable groups of consumers. When Florida's bill was introduced in 1987, lawmakers noted that "49% of senior citizens" and "34% of individuals with incomes below $15,000" were using credit cards. Fla. H.B. 448 Staff Analysis, at 5. More than a quarter-century later, concern for disadvantaged and marginalized populations continues to form part of the rationale for enacting such bans. Before passing its anti-surcharge law in 2013, for example, Utah's legislature heard testimony that the law would protect "families—particularly low-income families

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[5] *Available at* http://www.ibtimes.com/new-credit-card-transaction-fees-list-states-charging-4-surcharge-checkout-fee-1042384

and those with children," as well as citizens "continu[ing] to recover from the economic downturn of 2008," by "keep[ing] this money in their pockets so they can continue to contribute to the economy and won't be hurt by unexpected credit-card and debit-card surcharges." Hearings on S.B. 67 Before the S. Comm. on Bus. & Labor (Utah Feb. 14, 2013) ("Utah S.B. 67 Hearings") (statement in support from Utah Housing Coalition).

B. Enhancing Market Efficiency by Facilitating Price Comparisons

In support of the now-lapsed federal statute, congressional lawmakers expressed the "belie[f] that permitting unlimited cash discounts and prohibiting surcharges allows the competitive free market to operate." *See* S. Rep. No. 97-25, at 4, *as reprinted in* 1981 U.S.C.A.A.N. at 77. Some states have taken the same view. *See, e.g.*, Cal. Civ. Code § 1748.1(e) (providing that ban on surcharges was enacted "to promote the effective operation of the free market"). As they see it, the law should allow price differentials based on different methods of payment, but it should compel merchants seeking to employ variegated pricing to use a uniform method of arriving at such differentials. Such uniformity, it is thought, promotes the efficiency of the market by making it easier for consumers to rapidly compare prices.

Maine's prohibition on credit-card surcharges, for example, was enacted "to ensure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to the consumer and avoid the uninformed

use of credit and to protect the consumer against inaccurate and unfair credit billing and credit card practices." Me. Rev. Stat. § 8-502. The sponsor of Texas's statute went even further, warning that a legal regime allowing surcharges "would practically eliminate comparative shopping." Hearings on H.B. 1558 Before the House Comm. on Fin. Insts., 69th Leg., R.S. (Tex. April 22, 1985) (statement of sponsoring Rep. Blanton).

C. Promoting Commerce by Encouraging Use of Credit Cards

In enacting bans on credit-card surcharges, state and federal lawmakers have emphasized the substantial economic benefits derived from electronic commerce in general and credit-card usage in particular. Highlighting the advantages to consumers, for example, Florida's legislature observed that "[c]redit cards are used for convenience, safety, documentation of expenses and general record keeping, budgeting, to obtain good credit rating, and for additional protection against defective goods and services." Fla. H.B. 448 Staff Analysis, at 5.

As legislators and scholars have explained, businesses likewise benefit from common use of credit cards. To take just a few examples, credit-card use helps merchants by increasing the number of purchases consumers are willing and able to make, simplifying accounting, reducing the risk of theft and related insurance costs associated with cash transactions, and providing for certainty of payment—certainty that is especially important in facilitating larger transactions, for which the likely alternative

payment method is an uncollectible check. Semeraro, *supra*, at 47, 49; *see also* Rosenfeld, *Point-of-Purchase Bank Card Surcharges: The Economic Impact on Consumers*, at 9 (credit-card surcharges surreptitiously force cardholders to subsidize cash-paying consumers because of merchants' "net value gain from bank card acceptance and the resulting downward pressure it exerts on retail prices").

To the extent that credit-card surcharging suppresses sales, states have a strong interest in prohibiting or minimizing such surcharges. *See* Letter from Att'y Gen. Peter F. Kilmartin to R.I. H. Comm. on Corp., *quoted in* Press Release, AG Kilmartin Urges Passage of Credit Card Surcharge Prohibition Legislation, Department of the Rhode Island Attorney General (Jan. 23, 2014) (supporting credit-card surcharge prohibition as "big advantage in attracting consumers"). Robust sales activity helps states in a variety of ways—not least by generating increased tax revenues. The threat of surcharges depressing sales increases with the value of goods and services. *See* Drazen Prelec & Duncan Simester, *Always Leave Home Without It: A Further Investigation of the Credit-Card Effect on Willingness to Pay*, Marketing Letters 12(1) 5, 11 (2001) (for high-value transactions, consumers are willing to pay more using credit card than cash). A customer may be willing to swallow a 3% surcharge added to the cost of a candy bar, but the same customer might think twice before paying an extra 3% of the purchase price of a leather sofa. *See Credit Card Surcharges? No Way, Poll Says*, CreditCards.com (Aug. 16, 2012) (poll showing less

than a quarter of respondents were willing to pay more than a $1 surcharge).[6]

Not surprisingly, lawmakers have found that credit-card surcharging discourages credit-card usage. *See, e.g., Bill to Ban Surcharges on Credit Card Purchases Approved by Assembly Panel*, The Jersey Journal (Feb. 7, 2013) (New Jersey's anti-surcharge bill sponsor Assemblyman Vincent Prieto stating that "[a]dditional fees nowadays can mean a decrease in how much a consumer can spend on their families using their credit card").[7] Cash discounting, by contrast, does not tend to suppress credit-card usage to a comparable extent. *See* Pet. Br. 6–8; Br. of Scholars of Behavioral Econ. 8–11. Accordingly, state and federal lawmakers have concluded that laws prohibiting credit-card surcharges tend to promote economically desirable behavior, even when such laws allow merchants to impose differential pricing by discounting other methods of payment. *Expressions Hair Design* v. *Schneiderman*, 808 F.3d 118, 122–23 (2d Cir. 2015); *see also, e.g.*, S. Rep. 97-23, at 3 (1981), as reprinted in 1981 U.S.C.A.N.N. at 76 ("recogniz[ing] that while discounts for cash and surcharges on credit cards may be mathematically the same, their practical effect and the impact they may have on consumers is very different"); Fla. H.B. 448 Staff Analysis, at 3 (noting that "cash discounts provide lower prices to the consumer, immediately and directly," while unannounced credit-

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[6] *Available at* http://www.creditcards.com/credit-card-news/poll-credit-card-users-wont-pay-surcharge-1276.php.

[7] *Available at* http://goo.gl/r7NBvd.

card surcharges pose an immediate detriment to the consumer).

In sum, Congress and numerous state legislatures have found that laws prohibiting credit-card surcharges serve legitimate governmental interests entirely unrelated to the suppression of ideas. Those views find substantial support in economic and scholarly studies, and they have been endorsed by wide-ranging groups—including pro-consumer and pro-business groups alike—over a long period of time. So far as the legislative debate is concerned, of course, that is not the end of the story. Petitioners and their *amici* advance thoughtful arguments in support of their preferred policy; and, as the vigorous and continuing dialogue over credit-card surcharges makes clear, reasonable people can disagree on whether surcharge bans should be enacted. In considering constitutional challenges to such laws, however, this Court should not casually dismiss the policy judgments underlying 10 state laws and a previous congressional enactment. Instead, state statutes prohibiting credit-card surcharges, like state and federal laws more generally, should be presumed valid, construed with care, and struck down only as a last resort. As explained in the following part, petitioners' approach does not come close to complying with those well-established principles of constitutional adjudication.

III. FEDERAL COURTS SHOULD EXERCISE CAUTION WHEN CONSIDERING CONSTITUTIONAL CHALLENGES TO STATE STATUTES.

A. New York's statute is most reasonably interpreted to permit truthful speech concerning concededly lawful pricing conduct.

Before addressing petitioners' First Amendment claim, this Court must resolve a threshold question of statutory interpretation: Does Section 518, reasonably construed, bar petitioners from doing what they say they want to do?

In this Court, as in the proceedings below,[8] petitioners insist that state law be read in such a way as to thwart their right to speak. *See, e.g.*, Pet. Br. 3 ("New York's law keeps consumers in the dark by criminalizing truthful speech"); *id.* at 26, 27–28. Of particular relevance here, petitioners contend that "[i]f you use dual pricing, you may tell your customers only that they are paying *less* to pay without credit (a 'discount'), not that they are paying *more* to pay with credit (a 'surcharge')—even though they *are* paying more." Pet. Br. 1 (emphases in original).

New York's Attorney General, on the other hand, takes the view that state law "controls how sellers set

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[8] *See, e.g.*, Reply Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction, at 1 ("Rather than defend the statute as written, the state proposes a new one."); *id.* at 2 (arguing that plaintiffs' speech-restricting interpretation "is the *only* reasonable interpretation" of New York's law) (emphasis in original); Plaintiffs' Answer Brief to the Second Circuit, at 1–2, 17–18, 27.

prices and collect money from their consumers, not what they may or may not say about their prices." Resp. Br. 22. Under that view, "a seller is free to 'tell [its] customers, that a credit-card user ultimately pays 'more' than a cash user," and "could even characterize the credit-card price as containing a 'surcharge' over the cash price, so long as the credit-card price was at or below the regular price quoted to prospective buyers before a payment method was identified." *Id.* at 38–39.

This Court should reject petitioners' interpretation of state law for at least two independent reasons.

First, New York's law is most reasonably read not to criminalize truthful speech about permissible pricing schemes. The plain text of the law states only that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518 (McKinney 2016). That text, by its terms, does not bar *any* speech, much less *truthful* speech concerning concededly lawful conduct.

That should be the end of the analysis. *See Beck Chevrolet Co.* v. *Gen. Motors LLC*, 53 N.E.3d 706, 713 (N.Y. 2016) (noting, in the course of answering a question certified to it by the Second Circuit, that "the text of a provision is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning") (internal quotation marks omitted). At any rate, traditional tools of statutory interpretation do not support—much less compel—the conclusion that Section 518 criminalizes truthful speech. New York's courts have

not authoritatively construed Section 518 to do that; the federal statute on which New York's law was modeled—and which contains the exact same language as the operative provision of New York's law—did not do so either, U.S. Br. 23–32; the legislative history accompanying the enactment of Section 518 does not indicate that the law aims to restrict the dissemination of ideas; and no state interest would be advanced by construing the law to prohibit commercial speech truthfully characterizing concededly lawful conduct. *See Expressions*, 808 F.3d at 123–25 (surveying the legislative history of the federal and New York surcharge bans and noting the dearth of interpretive case law from the New York courts); Resp. Br. 3–13 (summarizing the legislative history of the federal and New York surcharge bans).

Second, and assuming *arguendo* that petitioners' alternative interpretation is fairly debatable, petitioners do not give this Court any good reason to read the law in such a way as to create rather than avoid constitutional concerns. Like federal courts interpreting federal law, New York courts take the view that "a [state] statute should be construed so as to avoid doubts concerning its constitutionality." *Lorie C.* v. *St. Lawrence Cty. Dep't of Soc. Servs.*, 400 N.E.2d 336, 341 (N.Y. 1980); *accord LaValle* v. *Hayden*, 773 N.E.2d 490, 494 (N.Y. 2002) ("[C]ourts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional.") (citation omitted). Respondents' eminently sensible construction of the law they are charged with enforcing does just that.

In the view of *amici* states, those considerations are sufficient to support respondents' submission that New York law, properly construed, does not prevent petitioners from truthfully characterizing lawful pricing conduct. *See* Resp. Br. 38–39. In any event, this Court should not go out of its way to adopt a "statute-killing" interpretation where, as here, it need not do so. *Dana's R.R. Supply* v. *Att'y Gen., Fla.*, 807 F.3d 1235, 1251 (11th Cir. 2015) (Carnes, C.J., dissenting).

As the Court of Appeals recognized, the prudential doctrine of abstention is properly invoked to avoid "needless friction with state policies," *R.R. Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 496, 500 (1941). *See Expressions*, 808 F.3d at 139 ("[W]e cannot hold a duly enacted state law unconstitutional based entirely on speculation that the New York courts might give it an expansive and arguably problematic reading that its text does not require."). Alternatively, "[c]ertification procedure . . . allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 76 (1997).

Both options are present here, and a federal court does not "shirk its obligation to fully adjudicate the case," Pet. Br. 45, when it asks if there is any reasonably available alternative to striking down a duly-enacted state statute. *See Arizonans for Official English*, 520 U.S. at 79 ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks

friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court.").

B. Respondents' interpretation of the statute they are charged with enforcing vindicates the speech-related interests petitioners purportedly seek to further.

To the extent that New York law bars credit-card surcharges while allowing for discounts on other methods of payment, petitioners raise a number of questions regarding the words they may use to characterize permissible price differentials. Those questions warrant consideration, but they should not lead this Court to strike down any part of New York's law. As explained below, respondents' interpretation of the statute they are charged with enforcing does not just embody the better view of state law; it has the added benefit of accommodating the speech-related rights petitioners purportedly seek to vindicate.

Consider the following three examples, all taken from petitioners' brief.

1. One of the petitioners, Expressions Hair Design, posted a sign informing customers that it would charge 3% "more" to pay for a haircut with a credit card. The salon took down the sign after learning of New York's law, and it now tells customers that it has two prices—a lower price for cash and a higher one for credit. The salon tries to be as careful as it can to avoid characterizing the price difference as a "surcharge" or an "extra" charge for paying with a credit card. Because of the law, however, Expressions is of

the view that it "cannot communicate its prices how it would like—by calling the difference a 'surcharge.'" Pet. Br. 20.

2. Four petitioners want to use a two-tiered pricing scheme and to call the differential a "surcharge" rather than a "discount" because they believe the word "surcharge" is more effective in discouraging customers from paying by credit card. Pet. Br. 21.

3. A pharmacy is concerned that it will be criminally prosecuted for truthfully telling customers about the higher cost of using a credit card if they accidentally say it in the wrong way. Pet. Br. 21.

Under a proper construction of New York law, it would seem that petitioners may do much, if not all, of what they say they want to do. Most importantly, Section 518 does not bar sellers from conveying truthful information about lawful price differences. Resp. Br. 38–39. Thus, Expressions Hair Design may post a sign saying that credit card customers pay "more" than other customers; its employees—like the pharmacy employees in the third example—may truthfully tell customers that credit-card customers pay more; and petitioners may even characterize a lawful price differential as an "extra charge" or "surcharge." Similarly, the four petitioners in the second example who want to employ a two-tiered pricing scheme may "*call* the differential a 'surcharge' rather than a 'discount'" (emphasis added). What petitioners may not do—the only thing they may not do—is *impose* a "surcharge" within the meaning of Section 518. Thus, for example, petitioners may not post a single

sticker price on products and then charge credit-card-paying customers more than that price.

Petitioners' confusion arises because the term "surcharge," like many words, may have different meanings in different contexts. Insofar as the statutory definition is narrower than the full range of colloquial meanings, some merchants may understandably feel inhibited from using the term "surcharge" in communicating with customers, even if they are not imposing a "surcharge" for purposes of the statutory prohibition. The solution to that problem is not to strike down a law permissibly proscribing certain kinds of credit-card fees; it is to make sure that the law is not used or understood to penalize activity that falls outside the ambit of the statutory prohibition.

Our judicial system gives petitioners the tools to do just that. For example, to the extent that they have a credible fear of prosecution, petitioners may ask for a declaratory judgment clarifying that the speech they seek to engage in is not prohibited by the statute; they may also argue, in the alternative, that the law would be unconstitutional if construed to bar truthful speech concerning concededly lawful pricing conduct.

A cautious approach is particularly appropriate here, because the linguistic problem underlying petitioners' claim is not unique to the realm of credit-card regulation. For example, suppose that a state law permissibly prohibits the selling of "obscene" materials, where the term obscene is defined in a manner consonant with the First Amendment as explicated by this

Court's precedents. A merchant who does not sell obscene materials within the meaning of the statute may nevertheless want to use the word "obscene" to describe certain videos that are lawfully being sold; and the intended use of that word may be entirely accurate, insofar as the word "obscene" may be truthfully employed to describe materials that do not satisfy the legal definition of that term. *See, e.g.*, X Oxford English Dictionary 656 (2nd ed. 2000) (defining "obscene" to mean, *inter alia*, "[o]ffensive to the senses, or to taste or refinement"). Such a merchant may be understandably reluctant to use the word "obscene" in describing merchandise, as such an avowal might well generate public criticism and attract unwanted attention from law-enforcement authorities. So far as the obscenity law is concerned, however, the merchant is free to use language that truthfully describes lawful merchandise. Indeed, a business could even be called "Obscene Videos"—as long as it does not actually sell obscene materials for purposes of the statute. And, even if a store sells prohibited depictions, the seller could be held criminally liable only for engaging in the proscribed commercial conduct, not for the form of words used to describe that conduct.

In sum, respondents' interpretation of the statute they are charged with enforcing would seem to embody the better view, and it assuredly embodies a reasonable view, of state law; and respondents' interpretation, unlike petitioners', has the added virtue of protecting rather than undermining the important speech-related rights petitioners purportedly seek to vindicate. That should be the end of this case. As the Second Circuit recognized, federal courts do not wield the Constitution like a wrecking ball, eager to strike

down state laws that need not and should not be read to invade protected rights. Section 518 is just such a law.

IV. PETITIONERS' CONSTITUTIONAL THEORY COULD IMPERIL A BROAD RANGE OF VALUABLE STATE AND FEDERAL LAWS AND REGULATIONS.

Petitioners and their *amici* argue that New York's law targets speech because it draws a distinction without an economic difference. In particular, they argue that a surcharge and a discount are just two ways of saying the same thing—"like calling a glass half full instead of half empty." Pet. Br. 1. To the extent that the law bans credit-card surcharges while allowing discounts on other methods of payment, petitioners reason, it impermissibly restricts how they may characterize effectively identical pricing practices.

The theory underlying petitioners' First Amendment claim does not just endanger New York's statute; if accepted, that theory could also cast a cloud of doubt on—or at least subject to heretofore unprecedented constitutional scrutiny—a broad array of state and federal laws and regulations that reasonably distinguish between different ways of getting to the same result.

A ruling for petitioners would most directly threaten other anti-surcharge laws. At present, ten states and Puerto Rico prohibit merchants from imposing surcharges on customers who choose to pay with credit cards. *See supra* at 1 n.1. Some of these laws, like New York's, say nothing about discounts for

other payment methods but may reasonably be construed to allow them.[9] Others, like Florida's law, expressly authorize offering such discounts.[10] The statutes also differ as to whether they define the term "surcharge,"[11] and if so, whether they narrowly define the term as an additional amount "imposed at the time of" the transaction,[12] or instead broadly define the term as "any means of increasing the regular price."[13] To the extent that these anti-surcharge laws might be construed as petitioners would have this Court construe New York's law, under petitioners' theory, they also could be subject to First Amendment scrutiny.

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[9] *See, e.g.*, Kan. Stat. Ann. § 16a-2-403; Tex. Fin. Code Ann. § 339.001; *see also Rowell* v. *Pettijohn*, 816 F.3d 73, 80–81 (5th Cir. 2016) (noting that Texas's law, like New York's, does not address discounts, but interpreting Texas's law to allow them).

[10] *See* Fla. Stat. § 501.0117(1); *see also, e.g.*, Cal. Civ. Code § 1748.1(a); Conn. Gen. Stat. § 42-133ff(c); Me. Rev. Stat. Ann. tit. 9-A, § 8-509(1); P.R. Laws Ann. tit. 10, § 12.

[11] *Compare, e.g.*, Fla. Stat. § 501.0117 (fully defining "surcharge"), Colo. Rev. Stat. § 5-2-212(1) (same), *and* Kan. Stat. Ann. § 16a-2-403 (same) *with* N.Y. Gen. Bus. Law § 518 (omitting any definition of surcharge) *and* Tex. Fin. Code Ann. § 339.001 (same); *see also* Cal. Civ. Code § 1748.1(d) (without fully defining "surcharge," specifying that certain types of charges "shall be deemed surcharges").

[12] *See, e.g.*, Fla. Stat. § 501.0117(1); Colo. Rev. Stat. § 5-2-212(1); Kan. Stat. Ann. § 16a-2-403.

[13] *See, e.g.*, Me. Rev. Stat. Ann. tit. 9-A, § 8-509(1); Mass. Gen. Laws ch. 140D, § 1.

In addition, five of the above-mentioned jurisdictions extend the same protection to customers who use debit cards,[14] one of which—Connecticut—protects all customers from the imposition of surcharges, regardless of their payment method.[15] To the extent that such laws should be interpreted as petitioners urge, these debit-card surcharge bans—enacted in part to protect lower-income and otherwise vulnerable consumers[16]—might fare no differently under petitioner's theory than would credit-card surcharge bans.

Anti-surcharge laws aside, petitioners' theory could subject to First Amendment scrutiny an array of other economic regulations, including some that have been enacted for public-safety purposes. Take, for example, laws relating to sales of alcoholic beverages. In states like Alaska, Rhode Island, and Vermont, bartenders may not offer "free" alcoholic drinks, but they may sell discounted drink-and-food

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[14] Conn. Gen. Stat. § 42-133ff(a); Kan. Stat. Ann. § 16a-2-403; Me. Rev. Stat. Ann. tit. 9-A, § 8-509(1); Okla. Stat. tit. 14A, §§ 2-211(A), 2-417(A); Tex. Bus. & Com. Code Ann. § 604A.002(a).

[15] Conn. Gen. Stat. § 42-133ff(a).

[16] *See* Benjamin Lævinger & Michael A. Zabek, *Credit or Debit: How Do Lower-Income Consumers Pay?*, 22 Communities & Banking 9, 9–10 (2011), *available at* https://goo.gl/DcezWn (survey by Federal Reserve Bank of Boston showing that debit-card use is more prevalent among lower-income consumers than among higher-income consumers).

combinations and offer free food and entertainment.[17] As the Vermont regulation explicitly provides, compliance with these and similar happy-hour laws may require that receipts for drink-and-meal combinations separately list the alcoholic beverage at full price, even though it makes no difference in the total amount that the customer pays.[18]

Under petitioners' theory, instead of targeting conduct, these laws might be construed to control how merchants characterize transactions in an effort to influence consumer behavior. After all, such laws plainly aim to reduce alcohol consumption, and—one might argue—there is no difference in economic result between a non-discounted meal with a "free" $5.00 drink and a drink-and-meal combination discounted by $5.00.[19] For similar reasons, tobacco laws that ban "multi-pack discounts" but allow sales on individual

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[17] *See* Alaska Stat. § 04.16.015(a)(1), (c); R.I. Gen. Laws § 3-7-26(b)(1), (c); Vt. Admin. Code § 14-1-3(49)(a), (52).

[18] Vt. Admin. Code § 14-1-3(52) ("All receipts must specifically outline the separate alcohol purchase at full price."); *see also* 14B N.C. Admin. Code 15B.0223(e) ("The offer of a meal and alcoholic beverage at a single total price is not a violation of this Rule so long as the total price reflects the actual price of the alcoholic beverages and not a reduced price.").

[19] Other alcohol sales regulations might pose similar concerns under petitioners' approach. *See, e.g.*, Ind. Code § 7.1-5-10-20 (banning happy-hour discounts and the offering of multiple drinks for a single price but not generally applicable pricing schemes that reduce the price for subsequent drink orders); Okla. Stat. tit. 37, § 537(B)(4) (ban on certain drink discounts that does not mention drink-and-meal packages); Utah Code Ann. § 32B-5-305 (same).

packs might also prove problematic. *See, e.g.*, *Nat'l Ass'n of Tobacco Outlets, Inc.* v. *City of Providence*, 731 F.3d 71, 74 (1st Cir. 2013). Here too, tobacco merchants might argue, there is no economic difference between an illegal two-for-one special and a legal 50% discount on two individual packs.[20]

Usury statutes arguably exhibit a similar dynamic. Those laws typically limit the rates of interest that lenders may charge for a given loan. *See, e.g.*, Fla. Stat. §§ 687.03(1) (prohibiting lenders from charging for certain loans "a rate of interest greater than the equivalent of 18 percent per annum simple interest"), 687.071(2), (3) (criminalizing the charging of interest at rates that exceed 25 percent per annum). But lenders often remain free to offset the cost of compliance by raising non-interest related charges, resulting in a total loan cost that may equate to what they would have charged absent an interest-rate cap. *See* Todd J. Zywicki, *Consumer Use and Government Regulation of Title Pledge Lending*, 22 Loy. Consumer L. Rev. 425, 427–28 (2010). To the extent that usury laws allow such "[t]erm re-pricing," *id.* at 428, they can fairly be said to focus on the structure of the loan rather than the total loan cost.

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[20] While a ban on "multi-pack discounts" might narrowly be characterized as a "prohibition on charging lower prices to . . . customers making higher-volume purchases," U.S. Br. 20, certain applications of such laws could still raise First Amendment problems under petitioners' theory. As applied to purchases of multiple packs, such a law allows merchants to structure transactions as sales on individual packs, but not as sales on volume purchases—a difference in the structure of the transaction that need not affect the ultimate economic outcome.

For the same reason that petitioners assail New York's surcharge law—its distinction between differently structured but economically equivalent transactions—some of these longstanding and heretofore-unquestioned regulatory measures might trigger a First Amendment analysis. The better view, however, is that government often has a legitimate interest in distinguishing between various methods of reaching a given outcome, and the difference is more than one of just semantics.

For example, in sentencing convicted defendants, the government may reward those defendants who cooperate with law-enforcement authorities and timely accept responsibility for their offense, *see* U.S.S.G. § 3E1.1, even though it may not penalize defendants for invoking their Fifth Amendment privilege against self-incrimination or their Sixth Amendment right to a jury trial. *See, e.g.*, *United States* v. *Cordell*, 924 F.2d 614, 619 (6th Cir. 1991) (collecting cases, noting that "[a]ll circuits addressing a facial challenge to § 3E1.1 on Fifth and Sixth Amendment grounds have concluded that it does not constitute a violation," and "[l]ike the other circuits," holding that "the denial of a downward adjustment under § 3E1.1 does not constitute a penalty or an enhancement of sentence"); *United States* v. *Henry*, 883 F.2d 1010, 1011 (11th Cir. 1989) ("We are unprepared to equate the possibility of leniency with impermissible punishment."). This is so even though the bottom-line result is arguably the same—a defendant who refuses to cooperate, pleads not guilty, puts the government to its burden of proof, and insists on having the case tried to a jury may not qualify for such a sentence reduction, and thus could

be said to have been "penalized" for invoking his privilege against self-incrimination or his right to a jury trial. He has not been penalized in a manner that offends the Constitution, however, because his sentencing range has not been raised above the default—*i.e.*, he is not subject to a guidelines sentencing range that is higher than it otherwise would have been in the absence of such a provision. *See United States* v. *Parker*, 903 F.2d 91, 105 (2d Cir. 1990) (collecting cases and holding that "[w]e reject [the] contention that the availability of a sentence reduction to one who clearly admits personal responsibility for the offense is the equivalent of an increase in sentence for one who does not").

As illustrated by the examples set forth above, policies of the kind embodied in anti-surcharge laws—policies that focus on the relationship between a readily ascertainable default and traditionally regulable conduct that may lead to a particular outcome, as opposed to focusing on the outcome alone—are more than mere wordplay. Just as there is a practically and constitutionally meaningful difference between raising a sentence above an identifiable default and withholding a sentence reduction, there is also a substantial difference between charging credit-card users more than the regular price and charging other customers less. That conclusion comports with common sense—as respondents point out, "if a restaurant adds two dollars to your bill after you hand them a credit card, you are unlikely to mistake this unambiguous surcharge for a discount." Resp. Br. 2. It also underlies a diverse array of valuable state and federal laws that have not been, and should not be, subject to heightened First Amendment scrutiny.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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RECORD AND BRIEFS.

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EXPRESSIONS HAIR DESIGN, *et al.*,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR ALAN S. FRANKEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The Marcus Corporation v. American Express Company, et al.,
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In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,
05-md-1720 (E.D.N.Y.) 2

OTHER AUTHORITIES

Dennis W. Carlton and Alan S. Frankel, *Transaction Costs, Externalities, and "Two Sided" Payment Markets*, 2005 Colum. Bus. L. Rev. 617 (2005) 4

Alan S. Frankel, *Monopoly and Competition in the Supply and Exchange of Money*, 66 Antitrust L. J. 313 (1998) 4, 6, 7

Alan S. Frankel and Allan L. Shampine, *The Economic Effects of Interchange Fees*, 73 Antitrust L.J. 627 (2006) 7

Allen Consulting Group, *Review of Reform of Australia's Payments System: Regulation of Credit Card Payments and the role of Diners Club: Report to Diners Club* (Sept. 6, 2007), *available at* http://www.rba.gov.au/payments-and-infrastructure/payments-system-regulation/past-regulatory-reviews/review-of-card-payment-systems-reforms/pdf/dc-06092007.pdf 10

American Express Australia Limited, *Review of Payments System Reforms: A Submission to the Reserve Bank of Australia* (Aug. 2007) 10

Sienna Kossman, *Survey: Card Acceptance for Tuition Rises, But So Do Fees*, CreditCards.com, August 23, 2016, available at http://www.creditcards.com/credit-card-news/colleges-charge-card-fee-survey.php 13

MasterCard Worldwide, *Payments System Regulation: Response by MasterCard Worldwide to the Issues for the 2007/08 Review* (Aug. 31, 2007), *available at* http://www.rba.gov.au/payments-and-infrastructure/payments-system-regulation/past-regulatory-reviews/review-of-card-payment-systems-reforms/pdf/mc-31082007.pdf 9, 10

Robert Mundell, *Uses and Abuses of Gresham's Law in the History of Money*, Zagreb J. Econ., Aug. 1998, *available at* http://www.columbia.edu/~ram15/grash.html 5

Schuh, et al., Federal Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments?* (2010), *available at* www.bostonfed.org/-/media/Documents/Workingpapers/PDF/ppdp1003.pdf 7

Reserve Bank of Australia, *Payments System Board Annual Report* (2012), *available at* http://www.rba.gov.au/publications/annual-reports/psb/2012/pdf/2012-psb-ann-report.pdf .. 8

Reserve Bank of Australia, *Payments System Board Annual Report* (2014), *available at* http://www.rba.gov.au/publications/annual-reports/psb/2014/pdf/2014-psb-ann-report.pdf 8, 11, 13

Reserve Bank of Australia, *Reform of Credit Card Schemes in Australia I: A Consultation Document* (Dec. 2001), *available at* http://www.rba.gov.au/payments-and-infrastructure/credit-cards/ia-consult-doc/pdf/ia-consult-doc.pdf 13

Reserve Bank of Australia, *Review of Card Payment Regulation, Conclusions Paper* (May 2016), *available at* http://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/pdf/review-of-card-payments-regulation-conclusions-paper-2016-05.pdf 9

Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behav. & Org. 39 (1980) 11

Stuart E. Weiner and Julian Wright, *Interchange Fees in Various Countries: Developments and Determinants*, 4 Rev. Network Econ. 290 (2005) 6

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The *amicus* has been a professional economist since 1985. He is President of Coherent Economics, LLC, a Senior Editor of the Antitrust Law Journal, a member of the U.S. Advisory Board of the Loyola University Chicago Institute for Consumer Antitrust Studies, and an Adjunct Professor at the Loyola University Chicago School of Law.[1] He received a Ph.D. in economics from the University of Chicago in 1986.

The *amicus* has undertaken extensive research into the nature of competition in payment systems and has been deeply involved in legal, regulatory, and policy disputes arising in credit card markets for over 25 years. He has published numerous articles concerning competition in payment card networks, including articles that investigated in detail the history and competitive effects of prohibitions on merchant surcharging or discounting.

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[1] *Amicus* certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person other than *amicus* or his counsel contributed money intended to fund the preparation or submission of the brief. *See* Sup. Ct. R. 37.6. *Amicus* advised counsel to all parties of his intent to file this brief on November 8, 2016, and counsel for Petitioners gave consent to the filing at that time. Counsel for Respondent Eric T. Schneiderman and Respondents Cyrus R. Vance and Kenneth P. Thompson each consented to the filing on November 10, 2016.

The *amicus* has served as an expert economist in engagements involving payment card networks—often involving disputes concerning contractual or legal restrictions on merchant surcharging or discounting—in the United States as well as Australia, Canada, Chile, the European Union, New Zealand, and the United Kingdom. In Canada, Chile, New Zealand, and the United Kingdom, he was engaged to serve as an expert witness by national competition authorities. In the United States, he has served as an expert economist in many disputes relating to payment card networks.[2] He has spoken about competition in payment card systems around the world, including at events sponsored by the Federal Reserve Bank of New York; the Federal Reserve Bank of St. Louis; the Federal Reserve Bank of Chicago; the Federal Reserve Bank of Kansas City; the American Bar Association's Section of Antitrust Law; the American Bar Association's Consumer Financial Services Committee; the American Antitrust Institute; Harvard Law School; the Chicago Bar Association; the Econometric Society in Auckland, New Zealand; the Organization for Economic Cooperation and Development in Paris, France; the International Cards and Payments Council

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[2] These include analyses of restraints on surcharging and discounting in the MasterCard and Visa networks in *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 05-md-1720 (E.D.N.Y.); in a credit card network that serves truck stops and truck fleet operators in *Marchbanks Truck Service, Inc. et al. v. Comdata Network, et al.*, 07-cv-1078 (E.D. Pa.); and in connection with a proposed settlement in *American Express Anti-Steering Rules Antitrust Litigation*, 11-md-2221 (E.D.N.Y.) and *The Marcus Corporation v. American Express Company, et al.*, 13-cv-7355 (E.D.N.Y.).

in Rome, Italy; the Canadian Bar Association in Toronto; and at a conference in Sydney, Australia sponsored by the Reserve Bank of Australia and the Melbourne Business School.

The *amicus* believes that a competitive retail economy provides substantial benefits to the public. The ability of merchants to freely determine the prices they charge in competition with other merchants and to communicate those prices to the public is fundamental to the efficient functioning of the retail economy. State laws which prohibit merchant "surcharging" of credit card transactions impede merchants' ability to convey price information, which in turn impedes the competitive process and harms the public overall. Lower income consumers, who disproportionately use cash to complete transactions, are especially disadvantaged.

SUMMARY OF ARGUMENT

Competitive markets generate tremendous benefits for the public. Central to the functioning of a competitive marketplace is the price system—the ability of merchants to establish prices for different goods or services and *communicate* those prices to customers or potential customers.

When two transaction types impose different costs on a merchant, the merchant has a choice: set a lower price for the lower-cost transactions and a higher price for the higher-cost transactions, or set one intermediate price for all transactions. The likelihood a merchant will set different prices depends on the amount by which the costs differ, the cost of implementing differential prices, and the cost and effectiveness of

communicating the multi-price system to consumers. Dennis W. Carlton and Alan S. Frankel, *Transaction Costs, Externalities, and "Two Sided" Payment Markets*, 2005 Colum. Bus. L. Rev. 617, 620 (2005). Impediments to differential pricing at the point of sale—based on differences in the cost or value of alternative forms of money—have been a cause of intense controversies in this country since the founding. Alan S. Frankel, *Monopoly and Competition in the Supply and Exchange of Money*, 66 Antitrust L. J. 313, 324-43 (1998) [hereinafter, *Monopoly and Competition*].

Because of the high fees that merchants pay to accept credit cards, many would prefer to use differential pricing on credit card transactions. This would generate substantial benefits to the public, but some of the gains would come at the expense of credit card issuers, who would face more effective competition from other payment methods.

Some states permit merchants to price differentially by offering "discounts" for cash, debit cards, or checks, while forbidding merchants from communicating mathematically equivalent price differentials as credit card surcharges. The direct economic effects of discounts and surcharges *on consumers* are identical. But the costs *to merchants* of discounting are significantly higher than those of surcharging. As a result, when state laws prohibit surcharging, fewer merchants will engage in differential pricing, depriving the public of the substantial benefits that would result.

ARGUMENT

I. Merchants' ability to implement differential pricing for credit card transactions benefits the public.

In economics, a "market failure" is a situation in which individuals acting rationally according to their incentives fail to produce the optimal outcome for society. Examples of market failures involving "externalities" would be the emission of pollution from a factory or automobiles. When a market failure occurs, the market fails to allocate resources efficiently, and society as a whole is less well-off than if the externalities could be eliminated.

One of the earliest known forms of market failure occurred when differential pricing was impractical—i.e., too costly, given the available technology—or was legally restricted. Historically, this was a problem of debased or non-standardized coinage. When the money presented for payment differed in intrinsic value, but prices did not vary accordingly, the result, as described by the popular formulation of *Gresham's Law*, was that "bad money drives out the good." The harmful effects of Gresham's Law have been recognized for centuries. Robert Mundell, *Uses and Abuses of Gresham's Law in the History of Money*, Zagreb J. Econ., Aug. 1998, at 57, *available at* http://www.columbia.edu/~ram15/grash.html. My research has extended the insights of Gresham's Law, drawing from historical disputes related to payment systems in the United States, including disputes over privately issued currency during the Nineteenth Century, the interbank check-clearing system that followed, and modern electronic credit card systems. I have shown that Gresham's Law

can be restated: "expensive forms of money tend to displace the inexpensive." *Monopoly and Competition, supra*, at 326. This occurs when merchants' prices do not adjust to take different costs into account.

Credit card networks impose substantial fees on merchants for credit card transactions, making credit cards a relatively costly payment method for merchants. This is especially true in the United States. Stuart E. Weiner and Julian Wright, *Interchange Fees in Various Countries: Developments and Determinants*, 4 Rev. Network Econ. 290, 299 (2005). Many merchants—and their customers—would be much better off if the merchants were able to avoid these costs, such as by steering (incentivizing) consumers to use cheaper payment methods. Unfortunately, relatively few merchants in this country engage in such steering. The problem has proven persistent, despite reductions in the cost of administering different prices at the register and legislative efforts to facilitate differential pricing. A major reason is the continued existence of prohibitions against communicating the higher price as a "surcharge" (e.g., "credit card convenience fee"), rather than all other payments at a "discount."

When users of low-cost payment methods are offered a "discount," merchants must set the list price of goods at a higher level. This higher list price can effectively discourage merchants from offering "discount" differential pricing entirely, as described in Part III, *infra*. If merchants choose not to offer differential pricing through discounts, they are likely to adopt intermediate prices that spread the cost of credit card transactions over the entirety of their sales.

This hits lower income Americans particularly hard, because they disproportionately use cash, and so receive none of the benefits that credit card users receive (which partly offset the higher retail prices those customers pay). *Monopoly and Competition*, *supra*, at 346-47; *see also* Schuh, et al., Federal Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments?* 1 (2010), *available at* www.bostonfed.org/-/media/Documents/Workingpapers/PDF/ppdp1003.pdf.

When the cost of credit cards is opaque to consumers, they often opt for the convenience of credit cards. The problem is exacerbated by credit card rewards programs which disproportionately benefit wealthy consumers. Rewards programs are designed to induce consumers to use a costly credit card as their default choice, based on increased individual benefit. The result is consistent with Gresham's Law. "If the merchant does not surcharge use of the card, then the consumer's individual interest will be served by choosing a relatively costly card . . . even if the combined benefit to the cardholder and merchant would be greater if the consumer used a different form of payment." Alan S. Frankel and Allan L. Shampine, *The Economic Effects of Interchange Fees*, 73 Antitrust L.J. 627, 645 (2006). In economic effect, the poorest Americans contribute to the funding of credit card rewards earned disproportionately by the wealthiest, while most consumers—and all consumers in the aggregate—are, on net, worse off.

II. The Australian experience confirms the benefits to the public from merchants' ability to differentially price credit card transactions.

When merchants price transactions to reflect the cost difference between cash (or debit cards, another low-cost option) and credit cards, their customers are incentivized to take into consideration not only their own costs and benefits, but also the differential costs imposed on the merchants resulting from that choice. And where merchants can communicate differential pricing as a lower base rate with an additional surcharge for credit card use, many choose to do so. In Australia, for example, where merchants have been able to surcharge credit card transactions since 2003, 43 percent of merchants included surcharges for at least some credit card transactions in 2014. Reserve Bank of Australia, *Payments System Board Annual Report* 33 (2014) [hereinafter, *PSB 2014 Report*], *available at* http://www.rba.gov.au/publications/annual-reports/psb/2014/pdf/2014-psb-ann-report.pdf. Although larger merchants are more likely to surcharge than small merchants, a significant fraction of even very small merchants implement credit card surcharges when they are permitted to do so. Reserve Bank of Australia, *Payments System Board Annual Report* 25 (2012), *available at* http://www.rba.gov.au/publications/annual-reports/psb/2012/pdf/2012-psb-ann-report.pdf.

Economic efficiency is enhanced and retail prices decline when merchants can effectively price credit card transactions differently. The Australian central bank summarizes the benefits of merchants' ability to surcharge credit card transactions:

> The ability of merchants to levy surcharges on different types of payment instruments is an important mechanism for promoting the efficient allocation of resources in the payments system. It allows merchants to signal the costs of different payment choices and to pass on these costs to users, aligning end users' private costs more closely to social costs and thereby contributing to a more efficient payments system. The outcome is that merchants are able to set prices for goods and services lower than would be the case if surcharging was prohibited, and the extent to which users of lower cost payment methods subsidise users of higher cost methods is reduced. The ability to surcharge also potentially improves merchants' bargaining position in relation to different payment methods, which can help keep downward pressure on merchant service fees and interchange fees.

Reserve Bank of Australia, *Review of Card Payment Regulation, Conclusions Paper* 30 (May 2016), *available at* http://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/pdf/review-of-card-payments-regulation-conclusions-paper-2016-05.pdf. MasterCard acknowledges that a merchant's "decision to surcharge card sales... would be accompanied by the scope for reducing prices for non-credit card sales." MasterCard Worldwide, *Payments System Regulation: Response by MasterCard Worldwide to the Issues for the 2007/08 Review* 17 (Aug. 31, 2007) [hereinafter, *MasterCard Response*], *available at* http://www.rba.gov.au/payments-and-infrastructure/payments-system-regulation/past-

regulatory-reviews/review-of-card-payment-systems-reforms/pdf/mc-31082007.pdf.

Finally, the ability to communicate surcharges has other expected beneficial effects. Credit card networks have acknowledged that merchants' ability to effectively communicate differential pricing makes competition more effective and induces the networks to set lower merchant fees. *See MasterCard Response*, *supra*, at 16-17 (Merchants' ability to discourage card use through surcharging "should be more than sufficient to avoid excessive interchange fees."); American Express Australia Limited, *Review of Payments System Reforms: A Submission to the Reserve Bank of Australia* 9 (Aug. 2007) ("Merchant benefits from the reforms include... increased bargaining power with [credit card network members] from the ability – or the threat – to surcharge"); Allen Consulting Group, *Review of Reform of Australia's Payments System: Regulation of Credit Card Payments and the role of Diners Club: Report to Diners Club* 11 (Sept. 6, 2007), *available at* http://www.rba.gov.au/payments-and-infrastructure/payments-system-regulation/past-regulatory-reviews/review-of-card-payment-systems-reforms/pdf/dc-06092007.pdf ("competitive forces have led to falls in Diners Club [merchant fees] over time. From the time that merchants have been permitted (but not obligated) to surcharge, these falls have been particularly large."). Incentives to avoid credit card use could significantly increase the competitive constraints on merchant fees imposed by card networks, which causes the high cost of credit card transactions in the first place.

III. It is less costly and more effective for merchants to communicate differential pricing as a credit card "surcharge" than as a cash "discount."

A price of $99 with a $2 surcharge for use of a credit card and a price of $101 with a $2 discount for use of cash are economically identical—assuming the consumer makes the same decision in either case. In practice, consumers do not behave as if the two are identical. It is much more difficult—costlier and less effective—to influence a consumer decision by framing the differential price as a cash discount than it is by promoting the lower price and framing the differential as a willingness to accept credit cards with a surcharge. *See* Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behav. & Org. 39, 45 (1980).

Even if an individual consumer would make the same choice, in the aggregate there is a first-mover disadvantage to a merchant choosing to offer discounts. With surcharges, merchants can reduce their posted prices and allay concerns that they will lose customers before those customers have a chance to digest the net impact of the change. Permitting merchants to frame differential prices as "surcharges" rather than "discounts" allows merchants to accurately pass on credit card fees with less concern that they will lose customers who avoid a merchant based on the higher list price—as would occur with "discounts."

Where it is permitted, many merchants choose to use differential pricing for only one or two of the most expensive credit card brands. *PSB 2014 Report*, *supra*, at 33. With a surcharge, this is quite simple. For

example, an Australian merchant might disclose "American Express, 1.5% surcharge" at the point of sale. A discount-only law, however, complicates the situation for merchants and for customers. It compels such a merchant to set its retail prices at the highest, American Express level—even if the merchant has few customers who pay with American Express cards—and communicate a 1.5% discount for Visa, MasterCard, debit cards, checks, and cash.

In sum, the prohibition on structuring a differential pricing system as a surcharge significantly increases the cost to the merchant of communicating a dual-price system, and reduces the effectiveness of that communication. Most merchants are therefore deterred from differential pricing.

IV. Where permitted, merchants display a strong preference for credit card surcharges over cash discounts.

Consistent with the analysis above, experience has confirmed that where merchants have the option either to frame a differentiated price as a surcharge on credit card transactions or as a discount on all other transactions, they are far more likely to choose the former. For example, unlike other merchants, universities in the United States were permitted by credit card networks to implement credit card surcharges on tuition payments. Whereas cash (or check) discounts on tuition were uncommon or nonexistent, surcharges, styled "convenience fees," immediately gained traction. A recent survey found that the percentage of schools accepting credit cards for tuition payments has grown, and—not coincidentally—among the schools that accept cards, 57 percent now

assess a credit card surcharge. There is no indication that even a single university sets tuition based on the use of a credit card and offers a discount for check payments. Sienna Kossman, *Survey: Card Acceptance for Tuition Rises, But So Do Fees*, CreditCards.com, August 23, 2016, available at http://www.creditcards.com/credit-card-news/colleges-charge-card-fee-survey.php.

Similarly, prior to the repeal of rules forbidding surcharges in Australia, the Reserve Bank of Australia noted that discounts for cash were common only for "high-value goods" such as home appliances. Reserve Bank of Australia, *Reform of Credit Card Schemes in Australia I: A Consultation Document* 32 (Dec. 2001), *available at* http://www.rba.gov.au/payments-and-infrastructure/credit-cards/ia-consult-doc/pdf/ia-consult-doc.pdf. As previously noted, by contrast, 43 percent of Australian merchants surcharged at least some credit card transactions in 2014. *PSB 2014 Report*, *supra*, at 33.

CONCLUSION

Price differentials that reflect differential costs of different customers or transactions are ubiquitous. When a merchant discloses that additional fees will be assessed for additional services, whether for giftwrapping, delivery, or use of a credit card, the merchant's customers can evaluate whether the optional service is sufficiently valuable to justify the added cost. Enabling merchants to set different prices for credit card transactions and effectively communicate those differentials as a credit card "surcharge" provides substantial benefits to the public. Permitting only "discounts" for non-credit card

transactions fails to impart the same benefits. Laws prohibiting surcharging increase the costs to merchants of informing consumers, reduce the effectiveness of that information, and harm the public through overall higher prices.

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RECORD AND BRIEF

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In The
Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINT ACADEMY, STEVE MILLES, PATIO.COM and DAVID ROSS,

Petitioners,

v.

ERIC. T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; KENNETH P. THOMPSON, in his official capacity as District Attorney of Kings County,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: property rights, economic liberty, educational choice, and freedom of speech. As part of its mission to defend freedom of speech, the Institute for Justice challenges laws across the nation that regulate a wide array of both commercial and non-commercial speech. In much of this litigation, *amicus* has been confronted with the central question presented in this case: whether a restriction on communicating certain information should be characterized as a restriction on "speech" (and therefore subject to robust judicial scrutiny) or whether it should instead be characterized as a restriction on "conduct" (and therefore subject only to rational-basis review).

The Second Circuit got this vitally important constitutional question wrong. In doing so, the court broke with binding Supreme Court precedent, most notably *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). Although *Humanitarian Law Project* is one of this Court's most recent and most authoritative pronouncements on the test for distinguishing regulations of speech from regulations of conduct, the Second Circuit

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[1] No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person – other than the *amicus curiae* – contributed money that was intended to fund preparing or submitting this brief. Pursuant to Supreme Court Rule 37(3), counsel for *amicus* states that counsel for the petitioners and counsel for the respondents have consented to the filing of this brief.

overlooked that decision. *Amicus* is deeply concerned that this ruling, if allowed to stand, will undermine this important precedent and imperil the First Amendment rights of businesses and consumers throughout our nation.

SUMMARY OF ARGUMENT

The central question in this appeal is whether New York's anti-surcharge law is a regulation of speech that must satisfy First Amendment scrutiny, or whether it is instead a regulation of conduct, to be evaluated under the more lenient rational-basis standard. Under this Court's decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), this is not a close call: New York's law operates as a restriction on speech that must be evaluated under the First Amendment.

New York allows businesses to have two prices for products or services – a cash price and a credit-card price. But New York bans businesses from *saying* that they are charging a higher price for credit-card customers. Instead, to operate lawfully, businesses must label the price disparity as a "discount" for non-credit-card users instead of as a "surcharge" for credit-card users. In other words, the law's penalties are triggered solely by how a seller communicates its prices to customers. Under *Humanitarian Law Project*, that fact is dispositive, and makes New York General Business Law § 518 a regulation of speech, not conduct.

The rule announced in *Humanitarian Law Project* was not new, it is the same commonsense approach to distinguishing speech from conduct that this Court has applied in commercial-speech cases as far back as *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The decision below cannot be reconciled with this unbroken line of precedent, and for that reason must be reversed.

ARGUMENT

New York's anti-surcharge provision limits buyer-seller communications. For this reason, it must satisfy First Amendment scrutiny. Yet, the Second Circuit recast the law as regulating only "conduct," allowing it to dispose of Appellants' claim under mere rational-basis review. As explained in Section A, that conclusion cannot be reconciled with the Supreme Court's recent ruling in *Humanitarian Law Project*, 561 U.S. 1. As explained in Section B, *Humanitarian Law Project* was not unique in this regard, as it merely restated the commonsense approach this Court has always used in distinguishing speech from conduct, even in cases involving commercial speech.

A. Under *Humanitarian Law Project*, Section 518 regulates speech because it is triggered by speech.

The First Amendment issues in this case are controlled by *Humanitarian Law Project*, 561 U.S. 1 – one

of this Court's most recent and most authoritative pronouncements on the line between speech and conduct. In that case, the Court considered the constitutionality of a federal law that criminalized giving "material support" to designated foreign terrorists in the form of, among other aid, "training" and "expert advice or assistance." 18 U.S.C. § 2339B(g)(4); *see also Humanitarian Law Project*, 561 U.S. at 8-9. The plaintiffs – U.S. citizens and domestic organizations – wished to provide training and legal assistance to a covered terrorist group "on how to use humanitarian and international law to peacefully resolve disputes" and "how to petition various representative bodies such as the United Nations for relief." *Humanitarian Law Project*, 561 U.S. at 14-15. Put more simply, they wanted to give prohibited "material support" by communicating advice. *See id.*

As in this case, the government defended the challenged law by arguing that it governed only conduct, and not speech. *Id.* at 26. But this Court emphatically and unanimously rejected that argument. *See id.* at 28 (majority opinion); *id.* at 42 (Breyer, J., dissenting).[2] In so doing, the Court articulated a clear test for distinguishing speech from conduct, holding that the First Amendment is implicated whenever a law's applicability turns on the content of a speaker's message. *Id.* at 27-28 (majority opinion).

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[2] Although Justice Breyer and two other Justices dissented from the majority's holding on the merits in *Humanitarian Law Project*, the dissenting Justices agreed with the majority that the challenged law was a restriction on speech, not conduct. 561 U.S. at 42 (Breyer, J., dissenting).

Applying that test to the material-support prohibition, this Court concluded that the law "regulates speech on the basis of its content," because whether the plaintiffs could lawfully communicate with designated terrorist organizations "depends on what they say." *Id.* at 27. If their speech imparted a "specific skill" or conveyed advice derived from "specialized knowledge" – training on international law, for example – then it would be barred. By contrast, if their speech conveyed general or unspecialized knowledge, it would be lawful. *Id.* So framed, the material-support law targeted parties' speech and called for heightened First Amendment scrutiny. *Id.*[3]

This reasoning applies with full force here. Petitioners may lawfully charge customers a higher price if they use credit cards than if they use any other form of payment. What New York's anti-surcharge law restricts is merely how sellers convey that price gap to consumers. In other words, the business owners' risk of criminal prosecution entirely "depends on what they say." *Humanitarian Law Project*, 561 U.S. at 27. If they phrase the price difference as a discount for non-credit-card transactions, then no crime has been committed.

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[3] Unlike Respondents – and the decision of the court below – the government in *Humanitarian Law Project* did not advocate against all First Amendment scrutiny of the challenged law. *See* 561 U.S. at 26-27 (majority opinion). Instead, the government argued for intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). Thus, New York's position in this case is even more extreme than the argument that this Court unanimously rejected in *Humanitarian Law Project*.

But if they phrase the difference as an added cost for credit-card users, then they are breaking the law.

Because the only difference between a lawful "discount" and an illegal "surcharge" boils down to whether a speaker uses the government's preferred phrasing, "the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28. Accordingly, the anti-surcharge provision must be reviewed as a content-based restriction on speech.

Indeed, New York's restriction is even more clearly speech-oriented than the law at issue in *Humanitarian Law Project*. In that case, the federal material-support law barred many types of aid to terrorist groups, including obvious non-speech conduct such as furnishing "safehouses" and "lethal substances." 18 U.S.C. §§ 2339A(b)(1), 2339B(g)(4). For this reason, it could be argued that the law "*generally* function[ed] as a regulation of conduct." *Humanitarian Law Project*, 561 U.S. at 27. But the same cannot be said for the anti-surcharge provision. Unlike the material-support law, New York's law operates as a limit on speech alone; it is triggered exclusively by speech and therefore must be subject to the First Amendment.

B. *Humanitarian Law Project* used the same commonsense logic this Court has always used in commercial-speech cases for distinguishing speech from conduct.

Although *Humanitarian Law Project* was not itself a commercial-speech case, the commonsense approach this Court took in that decision to distinguishing speech from conduct is similar to that which this Court has historically employed in commercial-speech cases as far back as this Court's seminal decision in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In that case, this Court considered the constitutionality of a Virginia law that prohibited licensed pharmacists from engaging in "unprofessional conduct." *Id.* at 752. Yet despite being nominally a regulation of "conduct," this Court had no trouble recognizing that, as applied to the conduct of "advertising of the price for any prescription drug," the law was triggered exclusively by speech. *Id.* Accordingly, this Court analyzed the law as a regulation of commercial speech, ultimately holding it unconstitutional.

From that point on, this Court's analysis in commercial-speech cases has regularly looked to whether the application of a challenged regulation was triggered by speech or by conduct. That is why this Court determined that the First Amendment was implicated by rules of professional "conduct" that regulated an attorney's right to describe himself as a specialist on his letterhead. *Peel v. Attorney Registration & Discipline Comm'n of Ill.*, 496 U.S. 91, 104-05 (1990). And it is also

why, in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, this Court held that the First Amendment was not implicated by a drug-paraphernalia ordinance that regulated the display of merchandise, rather than the communication of any information about that merchandise. 455 U.S. 489, 496 (1982). What these cases make clear is that the distinction between a regulation of speech and a regulation of conduct is, ultimately, a practical inquiry that turns on how the law is enforced in the real world.

The implications of these precedents for this case are best illustrated by the contrast between the decision below and the decision of the U.S. Court of Appeals for the Eleventh Circuit in *Dana's Railroad Supply v. Attorney General of Florida*, 807 F.3d 1235 (11th Cir. 2015), which considered the constitutionality of Florida's nearly identical anti-surcharge law. Unlike the court below, the Eleventh Circuit easily concluded that Florida's anti-surcharge law was a regulation of speech, rather than conduct, and it did so by looking at how the law was enforced in the real world. Recognizing that the challenged statute was the logical equivalent of banning restaurants from selling half-empty beverages while expressly allowing half-full ones, the Eleventh Circuit concluded that the law was triggered by descriptions of whether a price differential was a credit-card surcharge or a cash discount, rather than by the prices themselves, which were unregulated. *Id.* at 1245-46. As the Eleventh Circuit put it, the "surcharge ban" would be more accurately described as the "surcharges-are-fine-just-don't-call-them-that law." *Id.*

at 1245. And thus, because the application of the law was triggered by speech, First Amendment scrutiny applied. *Id.*

That was the correct approach, and it is the approach this Court should take here. Doing otherwise, and holding that New York's anti-surcharge law is a regulation of conduct, rather than speech, would not only be a break with decades of this Court's previous precedent on the speech/conduct distinction, it would also sow confusion in an area of the law that this Court has long treated as involving nothing more than practical, commonsense reasoning about how regulations in the commercial realm are actually enforced. Accordingly, this Court should reverse the decision of the Second Circuit and hold that Section 518 is a regulation of speech that must be analyzed as such.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Dated: November 17, 2016 Respectfully submitted,

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RECORD AND BRIEFS

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Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, ET AL.,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NEW YORK, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE INTERNATIONAL CENTER FOR LAW & ECONOMICS AND SCHOLARS OF LAW AND ECONOMICS IN SUPPORT OF RESPONDENTS

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Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011).....4

Other Authorities

Wilko Bolt et al., *Incentives at the Counter: An Empirical Analysis of Surcharging Card Payments and Payment Behaviour in the Netherlands*, 34 J. Banking & Fin. 1738 (2010), http://bit.ly/2h2IR8x 10, 23

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CHOICE, Credit Card Surcharging in Australia (2013), http://bit.ly/1ACjSYt 21, 24

James Daley, *Why Are We Still Being Charged for Paying By Credit Card?*, FairerFinance.com (Aug. 11, 2016), http://bit.ly/2gE4j41 24

Thomas A. Durkin, et al., *An Assessment of Behavioral Law and Economics Contentions and What We Know Empirically About Credit Card Use by Consumers*, 22 S. Ct. Econ. Rev. 1 (2014) 6

European Commission, Study on the Impact of Directive 2007/64/EC on Payment Services in the Internal Market and on the Application of Regulation (EC) No 924/2009 on Cross-Border Payments in the Community (Feb. 2013), http://bit.ly/2gpOevU 21

Claire Greene & Scott Schuh, *U.S. Consumers' Holdings and Use of $100 Bills*, Fed. Reserve Bank of Boston, Research Data Report No. 14-3 (Nov. 2014), http://bit.ly/2hyBAOJ 14

Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously*, 112 Harv. L. Rev. 1420 (1999) 7

Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193 (1991).....4, 7

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Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 UCLA L. Rev. 2 (2013).....5

Ian Lee et al., *Credit Where Its Due: How Payment Cards Benefit Canadian Merchants and Consumers, and How Regulation Can Harm Them* Macdonald-Laurier Institute (Oct. 2013), http://bit.ly/2hHsHje.....20

Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265 (2006).....9

Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321 (2008).....9

Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv. J. Legis. 1 (2008) 9

Ronald Mann, Assessing *the Optimism of Payday Loan Borrowers*, 21 S. Ct. Econ. Rev. 105 (2013) 6

Robert K. Rasmussen, *Behavioral Economics, the Economic Analysis of Bankruptcy Law and the Pricing of Credit*, 51 Vand. L. Rev. 1679 (1998) 6

Reserve Bank of Australia, Review of Card Payments Regulation (May 2016), http://bit.ly/2g4Icnz 24

Scott Schuh et al., *An Economic Analysis of the 2010 Proposed Settlement Between the Department of Justice and Credit Card Networks* (Fed. Reserve Bank of Boston, Public Policy Discussion Paper No. 11-3, 2011), http://bit.ly/2heLxgI 12

Adam C. Smith & Todd J. Zywicki, *Nudging in an Evolving Marketplace: How Markets Improve Their Own Choice Architecture*, Geo. Mason L. & Econ. Res. Paper No. 16-21 (Apr. 1, 2016), http://bit.ly/2hjY3fa 6

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INTEREST OF AMICI CURIAE[1]

The International Center for Law & Economics is a nonprofit, non-partisan global research and policy center. It works with more than fifty affiliated scholars and research centers around the world to promote the use of evidence-based methodologies in developing sensible, economically grounded policy that will enable business and innovation to flourish.

The Center is joined as amici curiae by several law and economics scholars, who are professors at leading U.S. universities. Their titles and affiliates are listed in an Appendix.

SUMMARY OF ARGUMENT

Petitioners base their First Amendment argument on two premises: first, that surcharges are "more effective" than discounts at altering consumer behavior; and second, that surcharges and discounts are economically equivalent except for their labels. Under this view, because the only difference between discounts and surcharges is how they are framed, it must be this framing that leads to the difference in consumers' responses. To explain why Petitioners believe this is true—and, thus, to maintain their claim that New York's surcharge prohibition is an impermissible restriction on speech—Petitioners and their

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel has made any monetary contribution to the preparation or submission of this brief.

amici rely on the behavioral economic concepts of "framing" and "loss aversion." They claim that the State impermissibly wishes to prohibit surcharging because these cognitive biases render surcharge labels more effective than discount labels in altering consumers' preferred form of payment.

Petitioners' premises are wrong. There is no sound evidence that the asserted behavioral theories are at work here, or that credit-card surcharging—much less the mere label used to describe the practice—more greatly affects consumers' chosen method of payment than cash discounting. In fact, some of the studies on which Petitioners and their amici rely suggest the opposite. The Court should not rely, in the absence of sound supporting evidence, on a malleable theory that can be used to support contradictory positions.

Moreover, surcharges and discounts differ in material ways beyond the words used to describe them. Surcharging—but not discounting—enables merchants to engage in certain pricing and sales practices that explain both consumers' different responses to them, as well as the State's interest in regulating them differently.[2] And while Petitioners lack empirical support for the behavioral claims at the heart of their First Amendment argument, the evidence from

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[2] Whether it is advisable as a matter of economics and policy for the State to treat surcharges and discounts differently is not at issue here. What is at issue is the adequacy of the particular economic and empirical assertions that Petitioners adduce in support of their First Amendment claims.

countries that permit surcharging reveals that merchants often use surcharges to engage in these types of pricing practices.

This Court should thus reject Petitioners' invitation to base constitutional doctrine on a behavioral hypothesis unsupported by any sound empirical evidence—especially where, as here, that result could potentially expose consumers to the type of conduct that the State's law seeks to prevent.[3]

ARGUMENT

I. This Court Should Not Strike Down A State Law Based Upon Behavioral Economic Theories Unsupported By Sound Evidence.

Petitioners' First Amendment argument relies upon a claim, derived from behavioral economics, that credit-card surcharges are more effective than cash discounts at altering consumers' chosen payment method—and that this difference is solely a result of how each is labeled. The greater "effectiveness of the surcharge label," Petitioners say, is why they "seek to employ it." Pet. Br. 7; *see also* Pet. Br. 34 ("[P]etitioners wish to frame the cost of credit as a surcharge so that consumers make better decisions."). And they insist that New York's law must satisfy heightened

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[3] For a more thorough discussion of these issues, see generally Todd J. Zywicki et al., *Behavioral Law & Economics Goes to Court: The Fundamental Flaws in the Behavioral Law & Economics Arguments Against No-Surcharge Laws*, Int'l Ctr. for L. & Econ. Fin. Reg. Res. Program White Paper 2016-1 (2016), http://bit.ly/2hKCBUr.

scrutiny to prevent the State from, in their view, "diminish[ing] the effectiveness" of their "ability to influence consumer decisions." Pet. Br. 31-32 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565, 577 (2011)) (alteration omitted). Several of Petitioners' amici make essentially the same claims and elaborate upon the behavioral economic bases for Petitioners' assertion. *See, e.g.*, Behavioral Economics Scholars Br. 2; Levitin Br. 9, 11; Retail Litigation Center Br. 14, 24; Ahold U.S.A. Br. 19-21.

Petitioners' claim, however, is merely a *hypothesis* about the relative effect of surcharges and discounts on consumer behavior—and one that, as we detail below, lacks any sound empirical basis. This appears to be the first time the Court has been expressly asked "to consider the insights of behavioral economic theory in reaching its decision." Behavioral Economics Scholars Br. 2. The Court should therefore be particularly careful before relying upon unproven speculations about the real-world application of behavioral economic theories—especially when those speculations are, as here, advanced to assert a constitutional basis for striking down a State law.

A. Behavioral Economic Theories Are Malleable And Should Not Be Relied Upon Without Empirical Support.

Petitioners' hypothesis rests primarily on the behavioral economic theory of "loss aversion," which posits a cognitive bias that causes people to react more strongly to transactions framed as losses than to gains of an equivalent value. *See* Pet. Br. 6 (citing Daniel Kahneman et al., *Anomalies: The Endowment*

Effect, Loss Aversion, and Status Quo Bias, 5 J. Econ. Persp. 193, 199 (1991)). Based on this generalized theory—and the assertion that surcharges and discounts can be viewed as "mathematically equivalent," Pet. Br. 26—Petitioners leap to the conclusion that *labels* do all the work, and that surcharge labels are inherently more effective than discount labels at altering consumers' preferred form of payment. Pet. Br. 7 (asserting that consumers are "much more likely to respond to surcharges (perceived as *losses* for using credit) than to discounts (perceived as *gains* for not using credit)").

But absent sound empirical evidence supporting these suppositions, such behavioral theories should not be uncritically accepted. The reality is that, despite their intuitive appeal, behavioral theories—and loss aversion, in particular—often fail to stand up to scrutiny when evaluated and tested against available evidence. *See, e.g.*, Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 UCLA L. Rev. 2, 5 (2013) ("In recent years, experimentalists have published data suggesting that the results of earlier laboratory experiments were not caused by loss aversion.... The legal literature has not kept up.").

The theory of loss aversion is so malleable it can be invoked to explain even opposite outcomes. Notably, in the credit-card surcharge context, a study conducted by the British government invoked the same theories as Petitioners and their amici here to explain a contradictory conclusion. According to the U.K. Office of Fair Trading, the posited "endowment effect

and loss aversion" biases make consumers more vulnerable to surcharges imposed late in the purchase process because "[a]s consumers go through the transaction process, their feelings of ownership increase and therefore so too does their willingness to pay." U.K. Office of Fair Trading, Payment Surcharges: Response to the Which? Super-Complaint 32 (July 2012), http://bit.ly/2fTZYca; *see also* U.K. Office of Fair Trading, The Impact of Price Frames on Consumer Decision Making 9 (May 2010), http://bit.ly/2fLC0RY.

In the realm of consumer credit regulation, numerous behavioral economic theories have been found wanting once the empirical evidence is carefully examined.[4] And studies testing the loss-aversion theory in particular, narrow settings (such as teacher compensation or golfing, *see* Behavioral Economics Scholars Br. 6-7) shed little light on whether or how that

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[4] *See, e.g.*, Thomas A. Durkin, et al., *An Assessment of Behavioral Law and Economics Contentions and What We Know Empirically About Credit Card Use by Consumers*, 22 S. Ct. Econ. Rev. 1 (2014) (debit cards); Tom Brown & Lacey Plache, *Paying with Plastic: Maybe Not So Crazy*, 73 U. Chi. L. Rev. 63 (2006) (credit card borrowing); Robert K. Rasmussen, *Behavioral Economics, the Economic Analysis of Bankruptcy Law and the Pricing of Credit*, 51 Vand. L. Rev. 1679 (1998) (bankruptcy); Ronald Mann, Assessing *the Optimism of Payday Loan Borrowers*, 21 S. Ct. Econ. Rev. 105 (2013) (payday loans); Adam C. Smith & Todd J. Zywicki, *Nudging in an Evolving Marketplace: How Markets Improve Their Own Choice Architecture*, Geo. Mason L. & Econ. Res. Paper No. 16-21 (Apr. 1, 2016), http://bit.ly/2hjY3fa (overdraft protection); Todd J. Zywicki, *The Behavioral Law and Economics of Fixed-Rate Mortgages (and Other Just-So Stories)*, 21 S. Ct. Econ. Rev. 157 (2013) (subprime mortgages).

theory operates in other settings (such as credit-card surcharging by merchants).

B. Petitioners' Surcharge Theories Are Not Supported By Sound Empirical Evidence.

The briefs supporting Petitioners in this case provide only scant evidence for the claim that the practice of surcharging is more effective than discounting in altering consumer behavior—and less support still for the additional claim that the surcharge *label* is responsible for any difference in effects.

In fact, the academic literature on which Petitioners and their amici rely is mostly a *matryoshka* doll of nested citations ultimately leading back to a single 1980 article by Richard Thaler.[5] That article, however, only *speculated* that consumers' cognitive biases might explain why surcharges and discounts have

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[5] *See* Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behavior & Org. 39 (1980); *see also, e.g.*, Kahneman, *supra*, at 204 (citing Thaler); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251, S261 (1986), http://bit.ly/2h1cA3x (same); Edmund W. Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217, 218 (1990) (same); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously*, 112 Harv. L. Rev. 1420, 1441 (1999) (citing Tversky & Kahneman, *supra* at S261, which cites Thaler); *see also* Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 Nw. U. L. Rev. 1295, 1312 (2003) (citing nothing).

been treated differently.[6] As the Behavioral Economics Scholars' brief candidly concedes, Thaler's article merely "predicted" that surcharges and discounts might impact consumer behavior differently because the former may be perceived as a loss, and the latter like a reward. Behavioral Economics Scholars Br. 8.

Petitioners' other amici thus plainly mischaracterize the literature when they assert that a "wealth of behavioral economics research" has "demonstrated" Thaler's hypothesis. Retail Litigation Center Br. 13-14; *see also* Ahold U.S.A. Br. 19-21 (suggesting that an "extensive" and "robust body of scientific research" supports Petitioners' First Amendment claim).

Collectively, Petitioners and their amici identify only three sources that purport to provide any empirical support for the claim that credit-card surcharges affect consumer behavior more than cash discounts do, and that this claimed difference is due to consumers' perception that a surcharge is a loss: (1) a survey of Dutch consumers; (2) the internal experience of furniture retailer IKEA; and (3) a new survey that some amici conducted specifically for inclusion in their brief. *See* Levitin Br. 9; Behavioral Economics Scholars Br. 8-11; Ahold U.S.A. Br. 21.[7] When fully and

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[6] *See* Thaler, *supra* note 5, at 45 (positing that card issuers' preference for cash discounts "makes sense *if* consumers" viewed them consistent with the theory of loss aversion) (emphasis added); *see also* Kitch, *supra* note 5, at 218 (referencing Thaler's "casual attempt" to explain the regulatory distinction).

[7] Petitioners themselves do not directly reference any empirical support for the claim, but cite (at Pet Br. 7, 31) articles by

fairly analyzed, however, these sources provide no meaningful support for the claim. And on some critical points, they actually suggest its converse.

Dutch Survey: In a survey of Dutch consumers, a greater percentage of respondents expressed a negative opinion about surcharges (74 percent described them as "bad" or "very bad") than expressed a positive view about discounts (22 percent described them as "good" or "very good"). *See* E. Vis & J. Toth, *The Abolition of the No-Discrimination Rule, Report for European Commission Directorate General Competition* 11-12 (2000), http://bit.ly/2fp0HQ8. These results fail to support Petitioners' claim for at least two reasons.

First, merely asking whether a consumer has a positive or negative opinion about surcharging fails to distinguish answers based on the concept of surcharging or the surcharge label from those based on consumers' experience with specific types of surcharges in practice. As discussed below (at 19-21, 23-24), in jurisdictions that permit surcharging, merchants seem to have engaged in excessive surcharging and insufficient disclosure. Some researchers have found

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amicus Professor Adam Levitin, who in turn cites the same material described herein. *See* Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 280-81 (2006) (discussing Dutch survey); Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1351-52 (2008) (same); Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv. J. Legis. 1, 19-20 (2008) (same).

that Dutch merchants, in particular, routinely surcharge at rates that substantially exceed the actual cost differential between cash and credit payments. *See* Wilko Bolt et al., *Incentives at the Counter: An Empirical Analysis of Surcharging Card Payments and Payment Behaviour in the Netherlands*, 34 J. Banking & Fin. 1738, 1740 (2010), http://bit.ly/2h2IR8x. Dutch consumers' reported dislike for surcharging thus may simply reflect their dislike for these pricing tactics, not a hypothetical aversion to surcharging per se.[8]

Second, this is merely an opinion survey. Consumer feelings about surcharges and discounts do not establish whether one or the other would be more effective at changing consumer conduct in the real world—much less that the message conveyed by a surcharge *label* would be responsible for that effect. The survey responses described above also say nothing about the percentage of consumers who dislike surcharges but, for whatever reason, will nevertheless accept the fee and pay with credit. *See Impact of Price Frames*, *supra* at 82 (finding that although consumers reported that they "felt cheated and annoyed" by poorly disclosed surcharges, they still typically paid the additional amount).

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[8] Petitioners make a similar mistake in their critique of the State's defense of the law. *See* Pet. Br. 31. That sharp business practices facilitated by surcharging may "cause consumers anger," NY CA2 Br. 9, or "psychologically" annoy consumers "by permitting unannounced price increases at the point of sale," JA 89, does not mean the State is regulating speech, or that it seeks only to diminish the effectiveness of a particular label. *See* Resp. Br. 34.

In fact, although unmentioned by either Petitioners or their amici, the Dutch survey also polled merchants and consumers about their actual experiences with surcharges and discounts. And both groups reported that surcharges were generally *less effective* than discounts at altering consumers' method of payment. *See* Vis & Toth, *supra* at 8-10. Merchants that surcharged estimated that 27 percent of consumers who were informed of the surcharge refrained from using a payment card, while merchants that used discounts reported that 43 percent of those who were offered a cash discount refrained from using a payment card. *See id.* at 8-9. Similarly, consumers in the survey reported that when it came time to make a purchase, they refrained from using a payment card in 38 percent of the transactions in which they were asked to pay a surcharge, but chose to use cash over credit in 50 percent of the transactions in which they were offered a cash discount. *See id.* at 9-10.

These results are directly contrary to the claim put forward by Petitioners and their amici. Although limitations in the survey data caution against relying heavily on the Dutch survey to support claims on either side of this case, it is telling that Petitioners and their amici rely on the survey to support their claim, but conveniently ignore the survey's findings that (whatever its failings) more directly support the relative efficacy of discounts over surcharges in changing consumer behavior.

IKEA Experience: In 2004, IKEA experimented with imposing a surcharge on credit card payments in its United Kingdom stores. IKEA reportedly found that "37 percent of credit card transactions moved to

debit." Scott Schuh et al., *An Economic Analysis of the 2010 Proposed Settlement Between the Department of Justice and Credit Card Networks* 27 (Fed. Reserve Bank of Boston, Public Policy Discussion Paper No. 11-3, 2011), http://bit.ly/2heLxgI. But that finding tends, unsurprisingly, to show only that imposing a cost on the use of a particular form of payment led some consumers to use that payment method less. It says nothing about whether surcharges would cause *more* consumers to switch payment methods than equivalent discounts would—as Petitioners and their amici claim here.[9]

Amici's Survey Conducted for Their Brief: Finally, one group of amici conducted a hypothetical survey "specifically for inclusion" in their brief. Behavioral Economics Scholars Br. 3; *see id.* at 9-11. That they felt the need to conduct a new, ad hoc survey—and did so only *after* the Court had granted the writ of certiorari—highlights just how little support Petitioners and their amici have had for their primary empirical claim during this litigation. The survey's questionable results also illustrate the problems of extrapolating from artificial—and often unrealistic—hypothetical questionnaires to draw inferences about real-world consumer behavior. Although these amici describe the methodology for their "experiment" as the "gold

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[9] Petitioners' amicus who cites the IKEA "study," Levitin Br. 9, notably does not rely on other findings relating to a separate offer IKEA later made to customers in its United States stores regarding a discount on their *next trip* to IKEA. The many differences between these two pricing schemes (not to mention their geographic and temporal differences) preclude any useful comparison between the two. *See* Zywicki et al., *supra* note 3, at 34-35.

standard" for testing psychological hypotheses, *id.* at 9, their evidence is really just a survey of how respondents *think* they might behave in an imagined (and unrealistic) scenario—not an actual experiment that tested how consumers would, in fact, behave if confronted with real incentives. *See* Jae Bong Chang, et al., *How Closely Do Hypothetical Surveys and Laboratory Experiments Predict Field Behavior?*, 91(2) Am. J. Agr. Econ. 518, 532 (2009), http://bit.ly/2h3Y1uc ("[N]onhypothetical choices are a better approximation of 'true' preferences than are hypothetical choices.").

The survey itself was also highly flawed. The survey instructed participants to imagine themselves in a scenario where they sought to purchase $130 in food at a convenience store. When presented with a hypothetical credit-card surcharge, 11 percent of respondents said they would choose to pay with a credit card; when presented with a comparable cash discount, 18 percent said they would do the same. From these results, amici conclude that "describing the price differential in terms of a credit-card surcharge reduced preferences to use a credit card by more than one-third relative to describing the price differential as a cash discount." Behavioral Economics Scholars Br. 10-11.

An obvious red flag is the unrealistically high percentage of participants who claimed they would pay in cash under *either* imagined scenario: 89 percent with the surcharge, and 82 percent with the discount. Those results are strikingly at odds with the available real-world evidence, such as the Danish study described above, where both merchants and consumers

reported that between 27 and 50 percent of consumers refrained from using a payment card when presented with either a discount or a surcharge.

The unrealistically high rates of cash payments in the study likely reflect the unrealistic nature of the imagined scenario itself. The survey instructed participants to "imagine" that they had $220 in cash and were contemplating a $130 purchase. But the hypothetical of carrying $220 in cash does not reflect reality for the vast majority of consumers. According to a recent study, only 8 percent of Americans regularly carry $200 or more in their wallets. *See* Claire Greene & Scott Schuh, *U.S. Consumers' Holdings and Use of $100 Bills* 3, Fed. Reserve Bank of Boston, Research Data Report No. 14-3 (Nov. 2014), http://bit.ly/2hyBAOJ. The median American consumer carries only $22 in cash—a full *order of magnitude* less than postulated by the experiment. *See id.*

A more realistic scenario would thus be something like:

> Imagine that you have a credit card and $22 [not $220] in cash in your wallet/purse. You wish to buy food at a convenience store.
>
> The salesperson says it costs $130 if you pay with cash. If you pay by credit card, there will be a surcharge of around 3%, bringing the total cost to $133.90.
>
> Would you pay by credit card or step out of line to find an ATM so that you can pay by cash instead?

In this more realistic scenario, one would expect far fewer than 80 percent of respondents to claim they would pay in cash when confronted with a surcharge. And that large discrepancy means one can only guess what percentage would pay by a particular method if offered a cash discount instead.[10]

Thus, when the three sources cited by Petitioners and their amici are actually examined, it is clear that they do not support the empirical claim that underlies Petitioners' case—i.e., that the no-surcharge law prevents merchants from using a label that is more effective than a discount label in altering consumer behavior. This Court should not reply upon a theory that is both inherently malleable and unsupported by sound empirical evidence.

II. Surcharges And Discounts Facilitate Different Pricing Practices, With Different Effects On Consumer Welfare.

Petitioners claim that New York's law is a "restriction on speech, not a regulation of conduct," because there is "no real-world difference" between surcharges and discounts aside from their label. Pet. Br. 28 (quoting *Dana's R.R. Supply v. Attorney Gen.*, 807 F.3d 1235, 1245 (11th Cir. 2015)). In other words, Petitioners argue that because surcharges and discounts are "equal in every way except [their] label," only the labels can explain why a State would want to

---

[10] This scenario also shows why consumers might dislike the credit-card surcharge but decide to pay it anyway, rather than abandon the transaction and start over at a different store. *See supra* at 9-10.

bar one but not the other. Pet. Br. 6. Several of their amici make a similar claim. *See, e.g.*, Behavioral Economics Scholars Br. 2; Levitin Br. 3, 9; Retail Litigation Center Br. 13, 19; Ahold U.S.A. Br. 19; Frankel Br. 4, 11.

That claim is wrong. Surcharges and discounts facilitate distinct pricing practices. A merchant that imposes a credit-card surcharge advertises one price (the cash price) and *increases* the final price for customers who pay with a credit card. A merchant that offers a cash discount, by contrast, advertises a *different* regular price (a higher, credit-card price) and *decreases* the final price for customers who pay with cash. *See* Resp. Br. 27-28.

Further, because surcharging facilitates a form of revenue extraction that discounting does not, the differential between the credit-card and cash prices is often greater for merchants that impose surcharges than for merchants that offer discounts. In particular, while merchants that offer discounts usually discount based on their costs of accepting credit cards, merchants that impose surcharges often increase the regular price at a rate that is based on the *consumer's* costs in switching to an alternative form of payment.

And retailers are not free to choose any posted price from which to surcharge up or discount down. Because market competition affects a merchant's ability to post a particular price, the posted price from which a merchant discounts will often not be the same as the final price that a merchant would charge after imposing a surcharge.

Because of these fundamental differences, surcharges facilitate at least two pricing practices that discounts do not.

First, surcharges allow merchants to post a lower regular price (on the shelf, in the storefront, or in an advertisement) than the credit-card price. Advertising a price that is lower than the maximum price a consumer may eventually pay makes it difficult for consumers who typically pay with a credit card to compare prices and make purchasing decisions.

Second, surcharges, but not discounts, allow merchants to earn above-cost profits when customers are unable efficiently to provide an alternative form of payment. Having invested time in the shopping process, decided to purchase her items, and waited to check out, the customer may accept a higher price to complete her purchase with a card (assuming she does not have sufficient cash) in order to avoid the cost of duplicating this effort. Although the credit-card interchange fee may be only 2 or 3 percent, for example, a merchant can use a surcharge to impose an additional premium on top of the posted price. The customer blames the credit-card company (because calling the price increase a "credit-card surcharge" suggests the merchant is merely passing on the credit-card fee), while the merchant pockets the difference.

As we detail below, the real-world experience from jurisdictions where surcharges are allowed confirms that surcharges tend to engender these pricing practices. And unlike credit-card surcharges, cash discounts do not facilitate these practices. Merchants

have incentives to broadly publicize any discount offers, and no merchant would discount a penny more than its actual cost of accepting credit to encourage a cash transaction—otherwise the merchant would be taking money out of its own pocket.

Thus, contrary to the arguments of Petitioners and their amici, surcharges and discounts are economically different pricing practices that can have materially different effects on consumer welfare.

A. Surcharges, But Not Discounts, Facilitate Inadequate Price Disclosures.

Both surcharges and discounts allow merchants to charge different prices to customers based on the customers' preferred method of payment. But unlike discounts, surcharges allow merchants to advertise a price that is *lower* than the final price that some customers will eventually pay. *See* Helene Bourguignon et al., *Card Surcharges and Cash Discounts: Simple Economics and Regulatory Lessons*, 10 Competition Pol'y Int'l 13, 20 (Autumn 2014); Resp. Br. 49-50. Advertising a price lower than the final price "reduce[s] the extent to which consumers [can] shop around and compare full price offers" and therefore "weakens the competitive pressure between retailers" and often results in "consumers not getting the best deal." *Payment Surcharges*, *supra* at 7.

To illustrate, suppose a consumer wants to buy a mattress. Store A advertises a price of $1,000, while Store B advertises a price of $1,030. Since the consumer buys a mattress only once every ten years, she does not readily know that only Store B's advertised

price reflects a baseline increase to cover credit-card acceptance costs. Accordingly, the consumer decides to shop at Store A. After spending an hour lying down on every mattress in the store, the consumer finally chooses the one she wants to buy. But when she reaches the checkout, the consumer learns that the advertised price of $1,000 does not include a 6 percent surcharge, which brings the grand total to $1,060. Because the consumer is carrying only $22 in cash (as the median American does, *see supra* at 14), and because the $30 difference between the two stores' credit-card prices may well be less than the value of the time it would take to find a comparable mattress at Store B, the customer may effectively be locked into paying the higher price.

In jurisdictions that permit credit-card surcharging, some merchants will inevitably employ this form of advertising. And when they do, merchants that would rather disclose any surcharge as part of their advertised price (like Store B above) are placed at a competitive disadvantage because they must advertise higher prices than their competitors'. *See Payment Surcharges*, *supra* at 28 n.25. Competitive pressure can thus encourage merchants to impose surcharges and limit their disclosure of those charges. Contrary to Petitioners' assertion that New York's law limits "the dissemination of truthful, non-misleading price information," Pet Br. 30, the law actually prohibits a practice that can impede the efficient dissemination of price information.

Jurisdictions that permit only cash discounting, by contrast, do not have this problem. There, an advertised price is the maximum price that a customer

will have to pay, and a merchant has strong incentives to publicize available discounts as a way to entice customers to shop at the store. *See* Resp. Br. 50-51. And in contexts where most purchases are via credit card (such as online, or for big-ticket items like hotels and airline tickets), the advertised price will be the real price for the vast majority of consumers. Further, to the extent that the advertised price differs from the price for paying in cash, the difference in price redounds to the customer's benefit.

Real-world experience shows that that credit-card surcharges are often employed to attract customers with seemingly competitive posted prices, only later to saddle them—sometimes at the very end of the transaction process—with an additional charge. *See* Ian Lee et al., *Credit Where Its Due: How Payment Cards Benefit Canadian Merchants and Consumers, and How Regulation Can Harm Them* 20-22 Macdonald-Laurier Institute (Oct. 2013), http://bit.ly/2hHsHje; Resp. Br. 49-50. As Nobel Laureate economist Jean Tirole and his colleagues have observed, a nearly ubiquitous feature of "international experiences with surcharging" is that "card surcharges are only announced at the point of sale, after consumers [have] incurred significant shopping costs." Bourguignon, *supra* at 19.

The British government has documented this phenomenon in online shopping, where surcharges are often disclosed only at the final screen of the checkout process. *See Payment Surcharges*, *supra* at 35-36 (observing that businesses often do not inform customers of a surcharge until the customer has "gone

through four to six web pages, where numerous decisions have to be made to tailor the product and where personal information often has to be provided"). Similarly, at least two studies of foreign jurisdictions have found that consumers often learn of surcharges only *after* a transaction has gone through or—even worse—*do not recall being notified of the surcharge at all*. *See* Vis & Toth, *supra* at 8 (approximately 11 percent of merchants in the Netherlands reported that they did not inform their customers of the surcharge); *accord* CHOICE, Credit Card Surcharging in Australia 14 (2013), http://bit.ly/1ACjSYt.

Real-world experience also reveals that merchants impose surcharges most often when customers tend to be "one-time or infrequent" shoppers lacking the opportunity to learn about a business's pricing practices. *See* Bourguignon, *supra* at 22. Examples include businesses such as air and holiday travel companies, restaurants, taxis, and gas stations. *See id.*; *see also* European Commission, Study on the Impact of Directive 2007/64/EC on Payment Services in the Internal Market and on the Application of Regulation (EC) No 924/2009 on Cross-Border Payments in the Community at 74, tbl.20 (Feb. 2013), http://bit.ly/2gpOevU (finding that a significantly greater percentage of merchants in the travel, hotel, and hospitality sector imposed surcharges than did merchants generally). The British government similarly has found that surcharging occurs most frequently where "consumers incur search costs to discover the surcharge." *Payment Surcharges*, *supra* at 29-30. The use of surcharges in these contexts is not to encourage the use of cash, but rather is to extract a premium charge on a vulnerable customer.

B. Surcharges, But Not Discounts, Facilitate Supracompensatory Prices.

Surcharges also create opportunities for merchants to charge supracompensatory prices by increasing surcharge rates beyond their costs of accepting credit cards. Many customers will simply pay the additional amount because they have no viable alternative to paying with a credit card by the time they learn of the surcharge. And the customer will often incorrectly believe that the additional fees are the fault of the credit-card company, and not the merchant—i.e., that the merchant is just "passing it on."

To return to the mattress-store example above (at 18-19), the consumer will decide to shop at Store A because its advertised price ($1,000) is lower than Store B's ($1,030), and the consumer does not have information about either store's surcharging practices. Once there, the consumer (carrying less than $1,000 in cash) often minimizes her own costs by simply paying the surcharge, rather than terminating the transaction and beginning anew at another mattress store. Knowing this, the store can maximize its profits by setting the surcharge rate *just below* the consumer's threshold for continuing with the transaction. That rate may be far in excess of the store's cost of accepting credit cards, and, in any event, will bear no necessary relationship to that cost—the recovery of which is ostensibly the reason for imposing the surcharge.

Cash discounting, by contrast, does not facilitate such pricing practices because market competition operates more effectively to ensure that cash discount rates reflect a merchant's actual costs of card acceptance. Consequently, a merchant generally will not be able to use cash discounts to extract above-cost profits because doing so would require the merchant to *advertise* the supracompensatory price. And in a competitive market, advertising a higher price will disadvantage the merchant, as competitors with similar marginal costs can advertise lower prices.[11] *See* Resp. Br. 31-33, 48-49. Further, a merchant has no economic incentive to offer a cash discount that exceeds the amount of its cost of accepting credit cards. To do so would generally erode the merchant's profit margin. Thus, while cash discounts will, as a practical matter, rarely exceed the actual cost difference between two payment devices, surcharges lack this inherent limitation.

Here again, the real-world experience in other countries confirms that surcharges facilitate above-cost pricing. As noted above (at 9-10), researchers have found that Dutch merchants routinely surcharged at rates that substantially exceeded the actual cost differential between cash and credit payments. *See* Bolt et al., *supra* at 1740. Another investigation in 2016 found that many British merchants imposed surcharges between 1 and 3 percent, even though the marginal cost to British merchants of credit card transactions was between 0.3 and 0.6

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[11] Petitioners entirely ignore this real-world limitation when they contend that New York's law allows profiteering via discounts. *See* Pet. Br. 41.

percent. *See* James Daley, *Why Are We Still Being Charged for Paying By Credit Card?*, FairerFinance.com (Aug. 11, 2016), http://bit.ly/2gE4j41; *see also Payment Surcharges*, *supra* at 38.

Australia has had the same experience, and one study found that Australian businesses "embraced surcharges as a new revenue stream." CHOICE, *supra* at 8; *see id.* at 12-13. The central bank's own analysis also found that "surcharge levels on some transactions appear to be well in excess of merchants' likely acceptance costs." Reserve Bank of Australia, Review of Card Payments Regulation 30 (May 2016), http://bit.ly/2g4Icnz. As a result, the central bank and the Australian government have had to adopt further reforms in an attempt to regulate what it deems "excessive surcharging." *Id.*

CONCLUSION

Petitioners' behavioral hypothesis that consumers will react more strongly to surcharges than to discounts of equivalent value is purely speculative and lacks empirical confirmation. In the absence of sound empirical evidence, this Court should not rely upon malleable behavioral economic theories in crafting constitutional law.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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RECORD AND BRIEFS

No. 15-1391

IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *et al.*,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE JAMES MADISON INSTITUTE; FLORIDA TAXWATCH; TEXAS PUBLIC POLICY FOUNDATION; YANKEE INSTITUTE; OKLAHOMA COUNCIL OF PUBLIC AFFAIRS; ADVANCE ARKANSAS INSTITUTE; INDEPENDENCE INSTITUTE; JOHN LOCKE FOUNDATION; SUTHERLAND INSTITUTE; CONSUMER FEDERATION OF THE SOUTHEAST; AND NATIONAL CENTER FOR PUBLIC POLICY RESEARCH AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Dana's R.R. Supply v. Att'y Gen. of Fla.,
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Erznoznik v. Jacksonville,
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FCC v. Fox Television Stations, Inc.,
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FCC v. League of Women Voters,
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Ferguson v. Skrupa,
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First Nat'l Bank of Boston v. Bellotti,
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Florida Star v. B.J.F.,
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Holder v. Humanitarian Legal Project,
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Hunt v. Wash. State Apple Adver. Comm'n,
432 U.S. 333 (1977) 22

Italian Colors Rest. v. Harris,
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Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.,
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Nebia v. New York,
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New State Ice Co. v. Liebmann,
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Reed v. Town of Gilbert, Ariz.,
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Rubin v. Coors Brewing Co.,
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United States v. United Foods, Inc.,
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Statutes

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Cal. Food & Agric. Code § 31255(b) 14
Cal. Gov. Code § 6159(h) 14
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Conn. Gen. Stat. §§ 42-110a et seq. 18
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Fla. Stat. § 215.332(3)(b) 12
Fla. Stat. § 215.332(5) 13
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Tex. Bus. & Com. Code § 17.46(b)(11) 20
Tex. Fin. Code § 339.001(b) 13

Other Authorities

A.G. Schneiderman Announces $158 Million Mobile Cramming Settlements With Sprint And Verizon, Attorney General of New York, http://on.ny.gov/2eJzB9P 19
Fed. Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations* 1 (2010) 7
Bruce Baker, *The Empty Promise and Untold Cost of Urban Renewal in Colorado* 5
Bureau of Consumer Frauds & Protection, Att'y Gen. of N.Y., http://on.ny.gov/2f7OrFK 22
Camera Violation Online, City of New York, http://on.nyc.gov/2eGm5lz 12

Consumer Frauds & Protection, Att'y Gen. of N.Y., http://on.ny.gov/2f7OrFK 22
Credit Card Convenience Fee FAQ, Cent. Conn. State Univ., http://bit.ly/2fk48qX 16
Tim Fang, *Credit Card Transaction Fee Goes Into Effect at San Francisco Parking Meters,* CBS SFBayArea, (Aug. 17, 2015 6:37 PM), http://cbsloc.al/2f4bjCI 14

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Fla. Dep't Fin. Servs., *Compliance Economic Review, Rule 69C-4.40045, Fla. Admin. Code, Convenience Fees* (Apr. 2013), *available at* http://bit.ly/2fzTwHB 13
Fla. Tax Watch Research Report, *Controlling Escalating Property Taxation and Local Government Spending and Revenue* (Dec. 2006) 5
Kathleen Hunker, *The Perils of Complete Regulation* 5
Zachary Janowski, *Does Connecticut Have Enough Healthcare?* 5
Memorandum from Kate Krell to Susan Stuntz & Jeff Ross, Hill & Knowlton (July 24, 1987) *available at* http://bit.ly/2fLyUNB 6
Parking Violations Issued – Fiscal Year 2015, City of New York, http://bit.ly/2eJMsJa 12
Pay and View Bills Online, City of Cambridge, http://bit.ly/2fYXkk1 17
Pay With Credit Card, Tex. Comptroller, http://bit.ly/2g0C1Rs 14
Sal Nuzzo, *Commercial Lease Tax Burden Hits Florida's Economy* 5
Scott M. Stringer, *NYC Budget Brief* (Mar. 2016), *available at* http://on.nyc.gov/2flOztB 12
Tax Payment Information FAQ, City of Hartford, http://bit.ly/2fk8iPX 7, 16

Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, Science, Jan. 30, 1981, at 453-58 7
View Bills Online, City of Boston, http://bit.ly/2f7Eqbz 17

STATEMENT OF INTEREST[1]

Amici curiae, submitting this brief in support of petitioners, are research and educational institutions that advocate for policies that protect and enhance free enterprise, particularly at the state level. Amici have a strong interest in assisting the public in rational economic decisionmaking.

The James Madison Institute is one of the nation's oldest and largest nonprofit, nonpartisan research and educational organizations. The institute's policy recommendations are rooted in the principles found in the U.S. Constitution and such timeless ideals as limited government, economic freedom, federalism, and individual liberty coupled with individual responsibility.

Florida TaxWatch is Florida's oldest and largest nonpartisan, nonprofit scientific public-policy research institute and taxpayer watchdog that works to improve the productivity and accountability of state government. The institute's independent research recommends productivity enhancements and explains the statewide impact of fiscal and economic policies and practices on citizens and businesses. For nearly four decades, Florida TaxWatch has pursued a three-pronged mission of improving taxpayer value, citizen understanding, and government accountability.

The Texas Public Policy Foundation is a nonprofit, nonpartisan research organization based in Aus-

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[1] The parties have consented to the filing of this amicus curiae brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the Amici made a monetary contribution to its preparation. (Rule 37.6).

tin, Texas, and is dedicated to promoting liberty, personal responsibility, and free enterprise through academically-sound research and outreach. Since its inception in 1989, the Foundation has emphasized the importance of limited government, private enterprise, private property rights, and the rule of law. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to advance principles of liberty and the Constitution.

The Oklahoma Council of Public Affairs is a public-policy research organization that applies the principles of limited government, individual liberty, and free markets to state-level issues. The organization advocates for economic freedom and opposes excessive employment licensing that makes it harder for regular Americans to get jobs and start businesses.

The Yankee Institute for Public Policy is a 501(c)(3) research and citizen education organization that does not accept government funding. The Yankee Institute's mission is to promote free-market solutions and smart public policy so that every Connecticut resident is free to succeed. The Yankee Institute achieves this objective by informing, inspiring, and motivating citizens and decisionmakers.

The Independence Institute is a Colorado-based nonprofit organization that conducts research and seeks to educate citizens on a variety of public-policy issues, including government regulation of business, economic freedom, healthcare, criminal justice, education, and taxation.

The Advance Arkansas Institute is a nonprofit,

nonpartisan public policy research and educational organization based in Little Rock, Arkansas. The Advance Arkansas Institute focuses on promoting individual rights, free enterprise, personal responsibility, and government transparency.

The Sutherland Institute, based in Salt Lake City, Utah, is a nonprofit think tank. The Sutherland Institute is dedicated to pursuing the path to a new birth of freedom for America through a free-market economy, civil society, and community-driven solutions.

The John Locke Foundation was founded in 1990 as an independent, nonprofit think tank. The John Locke Foundation employs research, journalism, and outreach programs to promote a vision for North Carolina of responsible citizens, strong families, and successful communities committed to individual liberty and limited, constitutional government.

The Consumer Federation of the Southeast ("CFSE") is a not-for-profit consumer group founded in 2003. CFSE is dedicated to consumer advocacy, with a focus on free-market consumerism and an emphasis on personal responsibility. CFSE's goal is to empower consumers to make informed decisions.

The National Center for Public Policy Research ("National Center") is a thirty-five-year-old think tank located in Washington, D.C. The National Center is dedicated to the belief that respecting the principles of a free market, limited government, individual liberty, and personal responsibility provide the most sound basis for successfully meeting the challenges facing America in the 21st century.

SUMMARY OF ARGUMENT

New York and nine other states purport to ban surcharges that pass through the costs imposed by credit-card companies and banks for credit-card transactions—costs known as "swipe fees." But each of these states simultaneously permits cash discounts from baseline prices that already incorporate credit costs. From an economic standpoint, what is permitted (marked-up price minus a cash discount reflecting the cost of credit) is exactly the same as what is banned (regular price plus a charge reflecting the cost of credit). Accordingly, what these laws really ban is a label; a name; speech. New York and other states contend these laws protect consumers and regulate *economic activity*, but what they really do is shield consumers from truthful *speech about economic activity*.

The bans' loopholes, contradictions, and ambiguities undermine any claimed consumer-protection purpose. First, each state that has a swipe-fee speech ban exempts its own government-run vendors. Second, swipe-fee labels convey truthful information about prices, and states typically require, rather than prohibit, such disclosure of hidden costs and risks. Third, state attorneys general typically police deceptive pricing, but these laws require them to suppress such information. And, fourth, these bans are so vague as to render them unintelligible to the average person, which only further clouds the pricing information available in the market.

ARGUMENT

I. STATE "SWIPE FEE" LAWS ARE RENT-SEEKING BANS ON SPEECH ABOUT ECONOMIC ACTIVITY, NOT BANS ON ECONOMIC ACTIVITY.

State statute books across the nation are replete with laws that interfere with the market. Some of these laws were passed with the intent to benefit consumers, some with the intent to benefit workers, some with the intent to benefit corporations. Several of these laws are simply bad policy,[2] passed with some patina of public purpose, while just under the surface lurks a powerful, rent-seeking faction that captured a legislative majority. *See* The Federalist No. 10, at 46 (James Madison) (Clinton Rossiter ed., 1961) (minority factions, "united and actuated by some common impulse," can pass laws "adversed to the rights of other citizens, or to the permanent and aggregate interests of the community").

Unfortunate as some of these economic policies may be, generally they are constitutionally sound under this Court's precedent. State legislatures, as the laboratories of democracy, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), "have broad scope to experiment with economic problems," *Ferguson v. Skrupa*, 372 U.S.

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[2] *See, e.g.*, Sal Nuzzo, *Commercial Lease Tax Burden Hits Florida's Economy*, James Madison Inst. (Apr. 2015); Fla. Tax Watch Research Report, *Controlling Escalating Property Taxation and Local Government Spending and Revenue* (Dec. 2006); Kathleen Hunker, *The Perils of Complete Regulation*, Tex. Public Policy Found. (July 2016); Zachary Janowski, *Does Connecticut Have Enough Healthcare?*, Yankee Inst. (Mar. 2015); Bruce Baker, *The Empty Promise and Untold Cost of Urban Renewal in Colorado*, Independence Inst. (Aug. 2016).

726, 730 (1963). Accordingly, this Court has held that states, whether "wise or unwise," *id.* at 732, may enact price controls, wage floors, bans on products, bans on professions, preferences for union or non-union workers, and income-redistribution programs. *See Nebia v. New York*, 291 U.S. 502 (1934) (price controls); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (minimum wage); *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (product ban); *Ferguson*, 372 U.S. 726 (ban on profession); *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (laws prescribing hiring practices); *Dane v. Jackson*, 256 U.S. 589 (1921) ("it is not within ... the ... power of this court to revise the necessarily complicated taxing systems of the states for the purpose of attempting to produce what might be thought to be a more just distribution of the burdens of taxation than that arrived at by the state legislatures"). This case does not require the Court to reexamine any of these precedents.

It is certainly true that, like the many state economic regulations upheld by this Court since 1937, the rent-seeking parties that pushed the ban at issue here offered a consumer-protection rationale as a thin disguise for advancing their own interests. Indeed, the credit-card companies even created a fake consumer group to feign grassroots support for these bans. Memorandum from Kate Krell to Susan Stuntz & Jeff Ross, Hill & Knowlton (July 24, 1987) *available at* http://bit.ly/2fLyUNB.

And it is also true that, like the economic regulations this Court has upheld, the ban at issue here achieves a significant wealth transfer from the public-at-large to the rent seekers by driving consumers to pay with credit cards instead of cash. *See* Pet.

App. 4a (Second Circuit recognizing that "credit-card surcharges are more effective than cash discounts at discouraging credit-card use among consumers"); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, Science, Jan. 30, 1981, at 453-58.[3]

But the similarities end there, because unlike regulations on *economic activity*, this ban governs *speech about economics* and nothing else. It distorts not the marketplace, but the marketplace of ideas. Unlike the price controls this Court has upheld in the past, the ban here does not outlaw a particular price or set of prices: merchants are free to have dual pricing to account for the cost of credit. *See Rowell v. Pettijohn*, 816 F.3d 73, 81 (5th Cir. 2016) ("[S]imilar to New York's law, Texas' does not forbid merchants from charging cash customers a different price than that charged to credit-card customers."); *Dana's R.R. Supply v. Att'y Gen. of Fla.*, 807 F.3d 1235, 1243 (11th Cir. 2015) ("the no-surcharge law does not ban dual-pricing"). These laws only ban merchants from calling a permissible price by a certain name. And such speech, "which does no more than propose a commercial transaction" is protected under the First Amendment, both because the speaker has a right to convey the truthful information and because the listener has a right to "information as to who is charging what." *Virginia State Bd. of Pharmacy v.*

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[3] Even those consumers who opt not to use credit cards contribute to this wealth transfer because, in practice, these bans drive merchants to "mark up their retail prices for all consumers by enough to recoup the merchant fees from credit card sales." Scott Schuh et al., Fed. Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations* 1 (2010).

Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762-64, 776 (1976). In the context of truthful economic information, the First Amendment both "may prevent the government from prohibiting speech, [and] may prevent the government from compelling individuals to express certain views." *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001).

That swipe-fee laws prohibit only speech is clear from the staff analysis that accompanied the senate bill that eventually became Florida's ban: "It should be noted that from an economic standpoint there is *no difference* between a cash discount, as permitted by [Florida law], and a credit surcharge, as would be prohibited by this bill." App. at A–119, *Dana's R.R. Supply*, 807 F.3d 1235, (Jan. 16, 2015) (emphasis added).[4] If a law does not change anything from "an economic standpoint"—if it makes "no difference"—it does not govern economic activity. To put it in mathematical terms, swipe-fee speech bans prohibit expressing one half of a formula. You can say "A or B" but you may not utter "not A and not B." Claiming that this ban regulates economic activity is like claiming that water consumption is regulated by a law that bans calling a glass "half full" but permits calling it "half empty."

That the swipe-fee laws prohibit only speech is

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[4] *See also Cash Discount Act, 1981: Hearings on S. 414 Before the S. Banking Comm.*, 97th Cong., 32, 43, 60 (Feb. 18, 1981) (credit-card industry representatives testifying that from a "mathematical viewpoint," "there is really no difference between a discount for cash and a surcharge for credit card use," but explaining support for labeling ban because a surcharge "makes a negative statement about the card to the consumer," and "surcharges talk against the credit industry").

also clear from the Second Circuit's explanation of how the ban operates: it alters how consumers act only by altering how they *think*, due to a "psychological phenomenon known as 'loss aversion[,]' [which] means that 'changes that make things worse (losses) loom larger than improvements or gains' of an equivalent amount." Pet. App. 3a (quoting Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991)). As Florida candidly admitted in the Eleventh Circuit, its purpose in passing its swipe-fee speech ban was to alter how consumers "may feel" when they see a surcharge label instead of a cash-discount label. Appellee's Br. at 38, *Dana's R.R. Supply*, 807 F.3d 1235, (11th Cir. Feb. 26, 2015). If a law only forces an equivalent value to be psychologically framed as a gain instead of a loss, it does not govern economic activity. Rather, it governs *labels* ascribed to economic activity; it governs *information* and *ideas* that trigger certain psychological responses and resultant consumer behavior.

The Second Circuit held that "[b]ecause all that Section 518 prohibits is a specific relationship between two prices, it does not regulate speech." Pet. App. 21a. But the statute does not "prohibit[] the relationship" between a surcharge price and a discount price, because that relationship is mathematically equivalent and to ban one would be to ban the other. The statute instead prohibits one way to express this relationship. In short, these swipe-fee speech bans are not economic regulations; instead, as the Eleventh Circuit put it, they "directly target[] speech to indirectly affect commercial behavior." *Dana's R.R. Supply*, 807 F.3d at 1239.

II. STATE SWIPE-FEE SPEECH BANS ARE RIDDLED WITH INCONSISTENCIES THAT UNDERMINE THE SUPPOSED CONSUMER-PROTECTION RATIONALE.

A. States Inexplicably Exempt Millions Of Transactions From Their Swipe-Fee Speech Bans.

The states with swipe-fee speech bans have attempted to justify the laws by claiming various consumer-protection rationales. New York claims its ban "prevent[s] bad consumer experiences." Corr. Br. of Resp't at 47, *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir. 2015), (ECF No. 59). Florida claims its ban prevents "consumer confusion." Appellee's Br. at 35, *Dana's R.R. Supply*, 807 F.3d 1235, (11th Cir. Feb. 26, 2015). Texas claims its ban prevents "surprise at the register, where the consumer thinks the posted price is X, goes to the register and realizes that it's actually going to be X plus Y because they're paying with a card." Mtn. Dismiss Tr., 30, Oct. 8, 2014 *Rowell v. Pettijohn*, No. A-14-CA-190-LY, 2015 WL 10818660 (W.D. Tex. Feb. 4, 2015), *aff'd sub nom. Rowell v. Pettijohn*, 816 F.3d 73 (5th Cir. 2016) (ECF No. 58). California claims its ban "protect[s] consumers from deceptive price increases for goods and services." Cal. Civ. Code § 1748.1(e).

As noted above, even a passing familiarity with the history of these bans reveals that the only protection truly sought was for the profits of credit-card companies. Pet'rs' Br. 8-19. But the Court need not resort to this legislative history to see that the rationales advanced by the states are illusory. The farce is revealed on the face of the statutes themselves, as states are careful to specify that, when

their governments are acting as merchants, swipe-fee speech is perfectly acceptable and causes no harm to the consuming public. Indeed, *every* state that has a swipe-fee speech ban exempts millions of transactions for no explicable reason.

Let us look first to the Respondent in this case, the State of New York. Although the New York Attorney General told the Second Circuit that "credit-card surcharges are prohibited across the board," Corr. Br. of Resp't at 47, *Expressions Hair Design*, 808 F.3d 118, (ECF No. 59), the state actually exempts itself from this blanket prohibition. *See, e.g.*, N.Y. Crim. Proc. Law § 420.05 (court system may use surcharge labels); N.Y. Pub. Auth. Law § 1045-j(4-a)(b) (water board may use surcharge labels); N.Y. Gen. Mun. Law § 5 (local governments may use surcharge labels). Suppose, then, that a New Yorker rushing to work hurriedly parks while he pops into a deli to grab a morning cup of coffee and a bite to eat, pays with a credit card, comes out to an unwelcome parking ticket, and later in the day attempts to pay the ticket online. Here is the public notice he will find on the City of New York's website:

> The City of New York offers multiple payment options. As a convenience to you, the City of New York accepts credit or debit cards. If you choose to pay with a credit or debit card, you **will** be charged a fee of 2.49% of the payment amount. This fee is **nonrefundable**. You will see this amount before you check out. The fee will be shown as a separate charge on your credit or debit card statement, and the New York City Department of Finance will be the

> merchant. This fee is used to cover the cost of processing credit and debit cards.

Paying a Parking or Camera Violation Online, City of New York, http://on.nyc.gov/2eGm5lz (emphasis in orginal).

Thus, while the New Yorker might be baffled as to why he received a ticket, and in the dark as to how much the credit on his bagel cost, he will know exactly what fee "the merchant" attaches, at "check out," to paying the ticket by credit card. New York cannot explain why the consumer must be shielded from knowing the swipe-fee cost on the $1.00 bagel transaction, but not from knowing the swipe-fee cost on the $65 payment for a parking ticket. And this is no small exception to New York's purported consumer-protecting ban on swipe-fee labels. New York City issued 11.8 million parking tickets in 2015. *Parking Violations Issued – Fiscal Year 2015*, City of New York, http://bit.ly/2eJMsJa. Parking tickets accounted for $565 million in revenue, with one-third of all tickets paid by credit card. Scott M. Stringer, *NYC Budget Brief* (Mar. 2016), *available at* http://on.nyc.gov/2fIOztB. Overall, the city collected almost $2 billion in annual fines and fees, including $10.5 *million* from credit-card surcharges, *id.*—what the city calls a "convenience fee," rather than dangerous merchant speech.

In Florida, whose ban is the subject of a petition for certiorari pending before this Court, state agencies accepting credit and debit cards are permitted to "impose a convenience fee" that reflects "the total cost to the state agency." Fla. Stat. § 215.332(3)(b); see also Fla. Admin. Code § 69C-4.0045. And local gov-

ernments are permitted "to surcharge the person who uses a credit card, charge card, bank debit card, or electronic funds ... an amount sufficient to pay the service fee charges by the financial institution, vending service company, or credit card company for such services." Fla. Stat. § 215.332(5). To add insult to injury, a 2013 government report states that "[s]mall businesses"—the very ones, like Dana's Railroad Supply, which are muzzled by Florida's swipe-fee speech ban—"may be required to comply with this rule [allowing government surcharges] when paying by payment card or electronic check." Fla. Dep't Fin. Servs., *Compliance Economic Review, Rule 69C-4.40045, Fla. Admin. Code, Convenience Fees* (Apr. 2013), *available at* http://bit.ly/2fzTwHB. According to that same 2013 report, all of this surcharging meant that "[o]ver the last five fiscal years, $15.58 million in convenience fees have been imposed on payments made to state agencies, while $11.70 million have been imposed on payments made to local governments." *Id.* Despite Florida's purported fears about consumer reactions to swipe-fee labels, no mass confusion over the issue has erupted between the state and local governments and taxpayers.

On the other side of the Gulf of Mexico, when it comes to swipe-fee bans and Texas, the state's motto appears to be: "Don't Mess with Taxes." The state's law, which is also the subject of a pending petition for certiorari, specifies that the ban "does not apply to a state agency, county, local governmental entity, or other governmental entity." Tex. Fin. Code § 339.001(b). Accordingly, if a Texan wants to pay his taxes online, the Comptroller's website notifies him that "[t]here is a non-refundable credit card portal processing fee that will be included in the transac-

tion, [and] this fee is based on the amount of tax paid." *Pay With Credit Card*, Tex. Comptroller, http://bit.ly/2g0C1Rs. Thus, despite Texas's claim that it must protect its consumers from surprise, a Texan will get one price on his tax bill, and then when he "goes to the register" on the Comptroller's website, he will "realize[] that it's actually going to be X plus Y." Mtn. Dismiss Tr., 30, Oct. 8, 2014 *Rowell v. Pettijohn*, No. A-14-CA-190-LY (ECF No. 58).

In California, whose swipe-fee speech ban is pending before the Ninth Circuit, "a court, city, county, city and county, or any other public agency may impose a fee for the use of a credit or debit card." Cal. Gov. Code § 6159(h); *see also* Cal. Civ. Proc. Code § 1010.5 (permitting California state courts to impose credit-card surcharges on fax filings); Cal. Food & Agric. Code § 31255(b) (permitting state animal-control officers to impose credit-card surcharges). The city of San Francisco thus proudly displays the cost of surcharges on all of its parking meters, and though the public might lament how difficult it is to find parking in the city, they are at least informed as to its cost. Tim Fang, *Credit Card Transaction Fee Goes Into Effect at San Francisco Parking Meters*, CBS SFBayArea, (Aug. 17, 2015 6:37 PM), http://cbsloc.al/2f4bjCI.

Worse still, California exempts an entire industry from the speech ban, as it "does not apply to charges for payment by credit card or debit card that are made by an electrical, gas, or water corporation and approved by the Public Utilities Commission." Cal. Civ. Code § 1748.1(f). Thus, in California, a light bulb purchase cannot be labelled with a surcharge, but the purchase of power to run the light bulb may be labeled with a surcharge. California has energy

problems, but consumer harm from knowing the cost of paying for electricity by credit card has not been identified as one of them.

Up in Maine, "a governmental entity may impose a surcharge for payments made with a credit card or debit card for taxes, fines, charges, utility fees, regulatory fees, license or permit fees or the provision of a specific service." Me. Rev. Stat. tit. 9-A, § 8-509. Indeed, when the government is doing the charging, Maine engages in a complete about-face as to the information that will be helpful to consumers: the credit surcharge information must be "disclosed clearly to the consumer prior to payment." *Id.*

In Colorado, "no seller" may use the surcharge label, Colo. Rev. Stat. § 5-2-212(1), unless that seller happens to be a "state governmental entity" or a "local governmental entity," which freely "may impose a convenience fee on persons who use" credit cards, with such fee "not [to] exceed the actual additional cost incurred by the state [or local] governmental agency to process the transaction," *id.* §§ 24-19.5-103(3), 29-11.5-103(3).

In Kansas, cities "shall not be subject" to the ban, and "may set a fee to be added to each credit card transaction equal to the charge paid by the city for the use of the credit card," so long as "the city shall provide notice of such fee to the person making payment by credit card." Kan. Stat. Ann. § 12-16,125.

In Oklahoma, the state permits municipalities to charge "a convenience fee" commensurate with the actual cost of the credit transaction. Okla. Stat. tit. 14A, § 2-211. Moreover, Oklahoma does not even believe that all private-sector merchants must have

their speech prohibited to protect consumers, as "private educational institution[s]" are also permitted to charge a convenience fee. *Id.*

Finally, in New England, both Connecticut and Massachusetts have put surcharge notices to good use across municipalities and government entities. For example, the Bursar's office at Central Connecticut State University has a helpful notice on its webpage recognizing that "many students and families appreciate the convenience of using a credit card," and explaining that, pursuant to a 2011 resolution of the Board of Trustees of the Connecticut University System, "a 2.5% non-refundable convenience fee" would be applied to all such transactions. *Credit Card Convenience Fee FAQ*, Cent. Conn. State Univ., http://bit.ly/2fk48qX.

The City of Hartford's Tax Collection Office has a friendly Frequently Asked Questions page, and one such question is: "May I pay my taxes with a credit or debit card?" The city answers: "For those taxpayers who choose to pay with Master Card there is a 2.50% convenience fee charged." *Tax Payment Information FAQ*, City of Hartford, http://bit.ly/2fk8iPX. And the city is careful to let taxpayers know: "This fee does not go to the City but to the bank for the transaction processing costs." *Id.* Hartford wants its taxpayers to know it is not taking one dime extra from them when they pay by credit card, but a merchant who pays taxes to the city is not permitted to provide this same information to his customers.

The City of Cambridge, Massachusetts permits citizens to pay a whole host of bills online with a credit or debit card. But the city, on its website, is careful to note it charges a convenience fee—actually,

eighteen different convenience fees depending on the type of card and type of bill being paid. *Pay and View Bills Online*, City of Cambridge, http://bit.ly/2fYXkk1. This is all clearly labeled for the payer in a multi-cell grid, each cell of which includes examples of the underlying "payment" and the "fee" charged on top of it. *Id.* Despite the state's general concern over confusion from swipe-fee disclosures, there are no known reports of Harvardians being duped by Cambridge's swipe-fee grid.

Not to be outdone, across the Charles River, "[t]he City of Boston offers residents an easy and convenient online payment system," but residents are warned that the "credit/debit card service charge is 2.75% of the total payment ($1.00 minimum)." *Pay and/or View Bills Online*, City of Boston, http://bit.ly/2f7Eqbz.

The examples could go on and on, but this handful is enough to demonstrate the point: the Swiss-cheese nature of swipe-fee speech bans undermines any purported consumer-protection rationale the censoring states have put forth. Each and every day, scores of thousands of credit-card transactions occur in these states and the cost and source of surcharges is clearly communicated at the point of sale. The consuming public appears able to navigate these transactions without harm.

As this Court has explained time and again, this type of underinclusiveness in a law prohibiting speech "undermines the likelihood of a genuine state interest." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978); *see also FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984) (underinclusiveness "renders doubtful ... any genuinely substan-

tial governmental interest" justifying a speech ban); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015) (discrediting purported aesthetic rationale for sign ordinance because law was "hopelessly underinclusive"). In particular, "exemptions and inconsistencies bring into question the purpose of [a] labeling ban." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995).[5]

B. Swipe-Fee Speech Bans Create Hidden And Deceptive Costs That State Consumer-Protection Laws Typically Prohibit.

Swipe-fee speech bans are not only internally inconsistent, but also stand as glaring and inexplicable exceptions to the overall framework of state laws that prohibit deceptive pricing and trade practices. Each of the ten states that has a swipe-fee speech ban also has a law prohibiting unfair and deceptive practices.[6] Typically, when states seek to protect consumers

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[5] This Court has taught this lesson to the State of Florida, in particular, on numerous occasions, yet the Sunshine State's swipe-fee speech ban remains on the books. *See Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) ("facial underinclusiveness of [the law] raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which [it] invokes"); *Erznoznik v. Jacksonville*, 422 U.S. 205, 215 (1975) ("underinclusive classification" undermines "presumption of statutory validity" in First Amendment context); *cf. Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 545-46 (1993).

[6] Cal. Bus. & Prof. Code §§ 17200 et seq.; Colo. Rev. Stat. §§ 6-1-101 et seq.; Conn. Gen. Stat. §§ 42-110a et seq.; Fla. Stat. §§ 501.201 et seq.; Kan. Stat. Ann. §§ 50-623 et seq.; Me. Rev. Stat. Ann. tit. 5, §§ 205A et seq.; Mass. Gen. Laws Ann. ch. 93A, §§ 1 et seq.; N.Y. Exec. Law § 63(12) and N.Y. Gen. Bus. Law §§ 349-50; Okla. Stat. tit. 15, §§ 751 et seq.; and Tex. Bus. & Com. Code Ann. §§ 17.41.

from deceptive pricing, they require *more* disclosure to the consuming public rather than an obfuscation of underlying costs.

For example, while New York bans separate disclosure of the cost of credit, it positively requires separate disclosure of the cost of taxes collected by merchants. *See* N.Y. Tax Law § 1132(a)(1). Left unexplained is why disclosure of one surcharge is good for consumers but the disclosure of another is not.

In another example, New York's Attorney General, at the same time he was defending the state's swipe-fee speech ban in the Second Circuit, announced a settlement of an enforcement action against mobile carriers in which he henceforth required the mobile companies to "present third-party charges in a dedicated section of consumers' mobile phone bills, [and to] clearly distinguish them from the carrier's own charges." *A.G. Schneiderman Announces $158 Million Mobile Cramming Settlements With Sprint And Verizon*, Attorney General of New York, http://on.ny.gov/2eJzB9P. What is not required, however, is a disclosure of the source and cost of credit charges if a mobile bill is paid by credit card. Again, left unexplained is why a clear disclosure of one type of surcharge benefits the public, but a clear disclosure of another does not.

Florida provides another example. There, a merchant can only advertise "wholesale" pricing if the good is "offered by the seller at or below his or her delivered net cost price," and "[a]ny retailer using the term or phrase" must "upon demand by a customer, forthwith make available ... for inspection, invoices, or shipping charges ... of any goods ... so offered for

sale ... indicating the delivery net cost to the seller of the particular goods." Fla. Stat. §§ 817.41(2)-(3). Thus, Florida requires complete, on-demand disclosure of underlying costs for products offered at "wholesale" prices, but positively bans complete disclosure of credit costs that are added to those wholesale prices at the point of sale.

In Texas and California, it is generally illegal to "mak[e] false or misleading statements of fact concerning [the] reasons for, existence of, or amount of price reductions," Tex. Bus. & Com. Code § 17.46(b)(11), Cal. Civ. Code § 1770(a)(13), yet the same seller is prohibited from honestly labelling the reason for a price increase from swipe fees at the point of sale.

Also in California, merchants advertising the price of "prepaid calling cards" must "clearly and conspicuously disclose" "[a]ll ancillary charges," including "all surcharges ... that may be imposed in connection with the use of a card or services." Cal. Bus. & Prof. Code § 17538.9. All surcharges, that is, except for the one that is assessed if the calling card is purchased on credit.

In Oklahoma, it is illegal to engage in a "deceptive trade practice," which is any "misrepresentation, omission or other practice that has deceived or could reasonably be expected to deceive or mislead a person to the detriment of that person." Okla. Stat. tit. 15, § 752. Unless, of course, the omission is a credit surcharge label, which even the Second Circuit explained is more likely to lead a consumer to spend more money on credit. Pet. App. 4a. Oklahoma also outlaws any "false or misleading statements of fact ... concerning the price of the subject of a consumer

transaction or the reason for, existence of, or amounts of price reduction." Okla. Stat. tit. 15, § 753. Unless, of course, the deception is that credit is costless.

In Connecticut and Maine, if a resident seeks to sell property, he will have to comply with extensive disclosure laws, mandating advanced notice of such items as the annual cost of operating the heating system and whether the property is located in a special tax district. Conn. Gen. Stat. § 20-327b; Me. Rev. Stat. tit. 33, § 173. The statutes also mandate when these disclosures are to be made: before a binding contract to purchase the property is executed by the buyer and seller. Conn. Gen. Stat. § 20-327b; Me. Rev. Stat. tit. 33, § 174. Yet, after the sale, if the new homeowner visits a home-improvement store, he will not be informed of the cost purchasing paint with a credit card.

As the district court in this case explained, "the speech restricted by section 518 concerns lawful conduct and is non-misleading," and by "truthfully and effectively conveying the true costs of using credit cards, surcharges can actually make consumers more informed rather than less, thus furthering rather than impeding the purposes of the First Amendment." Pet. App. 76a. The same is true of consumer-protection laws. The swipe-fee speech ban "actually perpetuates consumer confusion by preventing sellers from using the most effective means at their disposal to educate consumers about the true costs of credit-card usage." *Id.* at 77a.

The incongruity between swipe-fee speech bans and the broader consumer-protection goals in these states undermines the purported rationale. *See, e.g.*,

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 352-54 (1977) (purported consumer-protection rationale for labeling requirement undermined by inconsistency with broader regulatory framework).

C. Swipe-Fee Speech Bans Invert The Role Of State Attorneys General.

Typically, a state attorney general is the officer on the beat for consumer protection, enforcing price transparency and truth in marketing. A quick look at the attorney general's website in any of the ten states that have swipe-fee speech bans will confirm the prominence of this role. *See, e.g.*, *Bureau of Consumer Frauds & Protection*, Att'y Gen. of N.Y., http://on.ny.gov/2f7OrFK. Swipe-fee speech bans invert this role, forcing attorneys general to suppress truthful market information. And suppress they have.

New York's enforcement history is robust, with the Attorney General conducting sting operations and taking enforcement actions where the price difference between credit-card and cash transactions was communicated in the wrong way. Pet'rs' Br. 14-16. New York also has a reported case dating back to 1987 in which a merchant was convicted under the no-surcharge law for the phraseology his employee used in communicating credit costs to the customer. *People v. Fulvio*, 517 N.Y.S.2d 1008, 1010 (N.Y. Crim. Ct. 1987) (overturning the conviction on constitutional grounds).

In Florida, the Attorney General's office has sent letters to merchants threatening criminal prosecution for continued disclosure of swipe-fee costs. App. at A–70, A–80, *Dana's R.R. Supply*, 807 F.3d 1235, (11th Cir. Jan. 16, 2015) ("Consequently, if you are charg-

ing a surcharge to customers who pay for a transaction with a credit card, as defined in the statute, please suspend this practice immediately to avoid the possibility of further action by our office.").

Now that credit-card companies have freed merchants from contractual speech bans, Texas has created a new enforcement mechanism for its governmental ban. Effective September 2013, the Texas Office of Consumer Credit Commissioner ("OCCC") has authority to enforce the ban, which it has done in at least one case. The Texas OCCC sent a letter threatening prosecution if the merchant did not cease telling customers that paying with a credit card costs more. Pls.' Mtn. for Prelim. Inj. at 7, *Rowell v. Pettijohn*, A-14-CA-190-LY, 2015 WL 10818660, at *1 (W.D. Tex. 2015), *aff'd sub nom. Rowell v. Pettijohn*, 816 F.3d 73 (5th Cir. 2016) (ECF No. 32).

California has no reported enforcement actions, but the state's Attorney General acknowledged during argument in the district court that if credit-card surcharge labels were to become widespread, or if a large retail chain such as Wal-Mart or Home Depot were to begin disclosing swipe fees for credit-card transactions, then the Attorney General would likely take enforcement action. *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1206 (E.D. Cal. 2015).

D. Swipe-Fee Speech Bans Are Vague And Permit Arbitrary Enforcement.

Perhaps the most harmful inconsistency in swipe-fee speech bans is that their explicit text can be read in different and uncertain ways, leaving merchants clueless as to which words are illegal and which are not.

"[C]larity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). A statute is thus unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited." *Holder v. Humanitarian Legal Project*, 561 U.S. 1, 13 (2010) (internal quotation marks omitted). The public cannot be left to "guess at [a statute's] meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). And when a statute "interferes with the right of free speech, ... a more stringent vagueness test should apply." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

The vagueness of swipe-fee speech bans is unavoidable because the regulation is a logic-defying prohibition. The statute enshrines the fallacy that a credit-card surcharge and a cash discount—economic twins—are somehow different. This difference cannot be expressed, unless the difference is only a matter of words. And thus the question becomes: which words may be safely uttered?

The Second Circuit thought this an easy riddle to solve. It recognized that New York's ban "permits offering cash customers a discount *below* the regular price that is not also offered to credit-card customers. (That is, it allows what we have termed 'cash discounts.')." Pet. App. 14a. The court offered an illustration: "if a seller's regular price is $100, it may not charge credit card customers $103 and cash customers $100, but if the seller's regular price is $103, it *may* charge credit-card customers $103 and cash customers $100." *Id.*

But if we play out the Second Circuit's example, can the seller say any of the following to the cash-paying customer?

- "I am not charging you the three-dollar cost of credit, which is factored into the regular price."
- "I am not charging you the three-dollar credit surcharge, which is already reflected on that sticker."
- "There is a cash discount off that regular price. So if you change your mind and pay with credit, you are going to have to pay three dollars more."

And can the seller say any of the following to the credit-paying customer?

- "Because you are paying with a credit card, I am not discounting the three-dollar swipe fee."
- "Because you are paying with a credit card, you are not entitled to the three-dollar cash discount, and so you pay more using the credit card."
- "If you pay with cash, you won't have to pay the extra three dollars this regular price reflects."
- "If you pay with cash, you are paying three dollars less for not using a credit card."

Or suppose two customers are in the store, one with a credit card and one with cash, and they ring up the same good at two adjacent registers and see the price

difference. Would portions of the following conversation be illegal?

Credit customer: "Hey, how come he's paying three dollars less for the same thing?"

Cashier 1: "He's getting the cash discount."

Credit customer: "So it's cheaper to pay with cash than with credit?"

Cashier 1: "Yes."

Cash customer: "So how much more does it cost if I switch to credit?"

Cashier 2: "Paying with credit costs $3.00 more."

Cash customer: "Credit costs that much?"

Third customer (waiting in line): "Oh, yes, every time you pay with credit anywhere in the country, there is a surcharge. This store bakes the surcharge into its sticker price."

Cash customer (turning to Cashier 1): "Is that right? There's a credit surcharge?"

Manager (rushing from the backroom): "We are not at liberty to discuss that!"

Cashier 1: {nodding} "Right. You didn't hear that from me. I'm not supposed to say that." {winking}

Cashier 2: "Oh come on! We just told you that cash is cheaper every time. So

> yes, there's a fee every time you swipe the credit card."

A person of ordinary intelligence could not possibly solve this semantic Gordian knot.

CONCLUSION

For the foregoing reasons, and those set forth by Petitioners, the Court should reverse the Second Circuit and hold that New York's swipe-fee speech ban violates the First Amendment.

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RECORD
AND
BRIEFS

No. 15-1391

IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, et al.,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF LABOR, ENVIRONMENTAL, AND CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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Amanda Shanor, *The New* Lochner, 2016:1 Wisc. L. Rev. 133 ..... 10, 22

American Heritage Dictionary (5th ed. 2016) 12

Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 U. Tex. L. Rev. 1427 (2016) 22

John C. Coates IV, *Corporate Speech and The First Amendment: History, Data, and Implications*, 30 Const. Comment. 233, (2015) 24

Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165 (2015) 10

Robert Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. 867 (2015) 11

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INTERESTS OF *AMICI CURIAE*

Amici curiae[1] Labor, Environmental, and Civil Rights Organizations share an interest in defending the states' and political branches' historical power to regulate to protect the public and our environment. A ruling for Petitioners would threaten that traditional regulatory prerogative and upset the balance of power between legislatures and the courts.

Amicus the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") is a union of 1.6 million members in the United States and Puerto Rico, both in the public and private sectors, who share a commitment to service. AFSCME advocates for prosperity and opportunity for all working families. AFSCME's interest in this case is to defend the government's ability to regulate the economy so that AFSCME's members and other working Americans are protected from exploitation and deceptive business practices.

Amicus the American Federation of Teachers ("AFT"), an affiliate of the AFL-CIO, was founded in 1916 and today represents 1.6 million members in K-12 and higher education, public employment, and health care. The AFT has more than 3,500 locals nationwide. The AFT's interest in this case arises from its long-term commitment to defending the balance under the First Amendment between protected speech and associational rights on the one hand and the traditional right of government to issue economic and social regulation and legislation that

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this brief.

addresses conduct on the other.

Amicus the National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBT people through legislation, policy, and litigation, and represents LGBT people in First Amendment and other cases in courts throughout the country.

Amicus the National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and opportunities and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity for women in their families, including in the workplace. NWLC has played a leading role in the passage and enforcement of federal civil rights laws, including through class action and pattern or practice litigation and in numerous amicus briefs involving discrimination in employment before the United States Supreme Court, federal courts of appeals, and state courts.

Amicus Natural Resources Defense Council, Inc. ("NRDC") is a non-profit membership corporation founded in 1970 with hundreds of thousands of members nationwide. NRDC engages in scientific analysis, public education, advocacy, and litigation to protect human health and the environment. NRDC's

members rely on disclosure requirements and laws against false and misleading commercial speech to protect themselves and their families from environmental toxins and other harms.

Amicus the Service Employees International Union ("SEIU") is a labor union representing more than 2 million men and women in healthcare, property services, and public service employment in the United States, Canada, and Puerto Rico. SEIU is dedicated to improving the lives of workers and their families and creating a more just and humane society. SEIU's interest in this case is to defend the ability of elected officials to enact policies that protect working people and other consumers from exploitation or deception.

Amicus the Sierra Club is a national nonprofit organization with 67 chapters and over 665,000 members dedicated to educating and enlisting humanity to protect and restore the quality of the natural and human environment. The Sierra Club's concerns include protecting the public from products that pose risks to safety, health, and welfare. The Sierra Club's particular interest in this case is to preserve the ability of government entities to protect the public through regulation of commercial transactions, by adopting laws that support the public's right to know and that require disclosure of risks to consumers.

Amicus the United Steelworkers International Union ("USW") is an international trade union representing over 600,000 working women and men in the United States and Canada in a diverse range of manufacturing, mining, and service industries. USW participated in the Congressional hearings in support of a credit card surcharge ban that preceded the

passage of Pub. L. No. 94-222, 90 Stat. 197 (1976), the federal statute providing the model for the New York law, N.Y. Gen. Bus. L. § 518, at issue before the Court, and USW's positions at those hearings are referenced on pages 6 and 8 of Respondent's Brief. USW's interest in this case is to defend the ability of America's elected representatives to enact legislation that protects its members and other working people from deceptive business practices.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners and their *amici* disagree with the policy justifications for New York General Business Law § 518. But rather than leave economic policy decisions to the state legislature, where the interests of merchants, credit card companies, and consumers are appropriately weighed, Petitioners and their *amici* seek to constitutionalize their disagreement with this unremarkable consumer protection statute. In so doing, they invite a decision undermining distinctions—between conduct and speech and between commercial and non-commercial speech—that have guided First Amendment law for decades.

This Court has long distinguished for First Amendment purposes between laws aimed at conduct and laws aimed at speech. This conduct-speech distinction marks an important boundary between the functions of the judicial branch and those of the political branches and state governments, ensuring that courts are not enmeshed in policy disputes masquerading as constitutional questions.

Section 518, like its federal predecessor, aims at conduct rather than speech. The statute bars merchants from "impos[ing] a surcharge" on credit-card customers at the point of sale. Merchants remain free to offer discounts from their posted price to customers who pay with cash, to induce cash payment by posting a low price for cash buyers and a higher price for credit-card payers, and to speak about the evils of "swipe fees." Merchants are prohibited from engaging in only one course of conduct: charging consumers who pay with credit-cards a higher price than what was posted.

Because section 518, properly interpreted, regulates conduct rather than speech, a decision invalidating the statute risks undermining the longstanding conduct-speech distinction, with grave consequences. Such a ruling will leave courts with no doctrinally sound way to distinguish section 518 from laws that have been upheld for decades as aimed at conduct, *e.g.*, laws regulating deceptive marketing, securities disclosures, product safety warnings, workplace and housing discrimination, and even the communicative professions. Courts will be called on to adjudicate the kind of policy disputes they have avoided since the New Deal.

Petitioners' and their *amici*'s arguments demonstrate the dangers presented by a ruling in their favor. Their briefs encourage the Court to invalidate section 518 in part because of what are, in their view, the statute's undesirable social and economic consequences. *See, e.g.*, Cato Inst. Br. at 3-9; Consumer Action Br. at 9-16; Ahold U.S.A., Inc. Br. at 23-31. But accepting that invitation risks a return to the *Lochner* era, when courts displaced legislatures as the arbiters of social and economic policy—a role this Court has rejected since *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

Furthermore, even if this Court were to treat section 518 as a speech regulation (which it should not), it should reaffirm rather than depart from the longstanding principle of deference to commercial speech regulation. Petitioners' *amici* urge a radical change in doctrine that would subject all content-based regulation of commercial speech to strict scrutiny. But accepting that view would hamstring the political branches and states, because nearly all commercial regulation draws distinctions on the basis

of the topic addressed. Indeed, Petitioners themselves (unlike certain of their *amici*) seek application only of the ordinary commercial-speech test, making this case a particularly inappropriate vehicle for casting that test aside.

New York General Business Law § 518 is a conduct regulation that under settled precedent should be subject to nothing more than rational-basis review. A decision invalidating it as a speech restriction (especially via some departure from ordinary commercial-speech principles) risks a return to an era when courts, rather than legislatures, passed on the wisdom of general economic legislation.

ARGUMENT

I. A DECISION INVALIDATING SECTION 518 WOULD UNDERMINE SETTLED DOCTRINE AND SUBJECT ORDINARY SOCIAL AND ECONOMIC REGULATION TO CONSTITUTIONAL CHALLENGE.

A. The conduct-speech distinction is settled law and serves important purposes.

This Court has long held that laws aimed at conduct do not implicate the First Amendment even if the regulated conduct is achieved through or evidenced by language. As explained in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 502 (citing *Fox v. Washington*, 236 U.S. 273, 277 (1915) and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

When a law regulates conduct achieved through language, "the unprotected features of the words [used to achieve the conduct] are, despite their verbal character, essentially a 'nonspeech' element of communication." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). "That is why[, for example,] a ban on race-based hiring may require employers to remove 'White Applicants Only' signs." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (quoting *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006) ("*FAIR*"); *R.A.V.*, 505 U.S. at 385).

Put another way, even a law that may conceivably limit what a person says is properly viewed as outside the First Amendment's purview when the law's purpose is to regulate conduct and not to suppress or favor ideas. *See Sorrell*, 564 U.S. at 567. Indeed, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," *id.*, even if the speech incidentally burdened is core political expression. *See id.* ("'an ordinance against outdoor fires' might forbid 'burning a flag'" without implicating the First Amendment, even though flag-burning is a form of protected expression (quoting *R.A.V.*, 505 U.S. at 385)). "Any other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986) (O'Connor, J., concurring).

Because the government may regulate conduct generally without implicating the First Amendment, it is also specifically true that "the State does not lose its power to regulate commercial activity deemed

harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Thus, even though a transaction cannot be accomplished without communication (a seller communicates an offer of a particular good or service for a particular price; a buyer communicates a counteroffer or acceptance), it has always been held within the states' power to regulate transactions without offending the First Amendment. *See id.*

For that reason, it is also beyond debate that a law regulating prices is a form of direct economic regulation that does not implicate the First Amendment. Eight justices emphasized this point in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), agreeing that "direct regulation" requiring "higher prices" for certain alcoholic beverages "would not involve any restriction on speech." *Id.* at 507 (plurality op.); *see also id.* at 525 (Thomas, J., concurring in part and concurring in judgment) (regulation "directly banning a product, ... controlling its price, or otherwise restricting its sale in specific ways" "involv[es] no restriction on speech"); *id.* at 530 (O'Connor, J., concurring in judgment) (regulation "establishing minimum prices" does not require First Amendment analysis).

This is so even though the "power to ban the sale of [a particular product] entirely does not include a power to censor all advertisements that contain accurate and nonmisleading information about the price of the product." *Id.* at 513 (plurality op.); *see also Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976). States may directly regulate how sellers determine their prices for goods or services even though they may not ban all truthful advertisements of the sellers' lawfully

determined prices. *See Va. State Bd. of Pharm.*, 425 U.S. at 773. Critically, this means the First Amendment does not prevent the direct regulation of product-pricing practices, even though such regulation will necessarily affect what sellers may say in their advertisements (in that sellers may advertise only lawful prices). *See id.*

The Court's distinction between laws aimed at conduct and laws aimed at speech is grounded in the recognition that "an expansive interpretation of the constitutional guaranties of speech and press" otherwise would be unworkable and would significantly reconfigure the relationship between the legislative and judicial branches. *Giboney*, 336 U.S. at 502. The absence of a conduct-speech distinction would lead to an unduly broad reading of the First Amendment which would, for example, "make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." *Id.*

Indeed, because "[v]irtually everything humans do requires the use of language," "virtually all government regulations will, in one way or another, 'burden' speech, if by speech we mean the use of human language." Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165, 179 (2015) (citation omitted). Human communication – literal "speech" – is "literally everywhere." *Id.* "The conduct of buying a car, for instance, involves conversations with the dealer, the offer of a price, and the signing of a contract that is written in words." Amanda Shanor, *The New* Lochner, 2016:1 Wisc. L. Rev. 133, 177.

But laws regulating contracts have not traditionally posed First Amendment problems, and for good reason. If they did, even something as ordinary as a state statute of frauds would require searching constitutional scrutiny. *Cf.* Robert Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. 867, 914 (2015) (although "every rent control law limits the words we may express in a contract," rent control laws are not currently held to implicate the First Amendment). Given the ubiquity of human communication, interpreting the First Amendment to encompass every law that burdens speech *qua* speech would subject practically the entire policymaking work of the states and the political branches to constitutional review.

Such a rule would also contravene the Court's historical recognition that the state's power to regulate economic activity is broad. Over eighty years ago, this Court remarked that "there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." *Nebbia v. New York*, 291 U.S. 502, 537 (1934). In fact, the propriety of general economic regulation has been recognized far longer than that: "[I]t has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeeper, &c., and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold." *Munn v. Illinois*, 94 U.S. 113, 125 (1877).

B. Invalidating section 518 would undermine the conduct-speech distinction.

Section 518 regulates merchants' conduct in a manner that, under this Court's longstanding precedent, does not implicate the First Amendment. The law bars sellers from imposing a "surcharge" on customers who pay with credit cards. Although the statute does not define "surcharge," that word's ordinary meaning is "[a]n additional sum added to the *usual* cost or amount paid." American Heritage Dictionary 1752 (5th ed. 2016) (emphasis added); *see also* Webster's Third New International Dictionary 2299 (2002) (defining "surcharge" as "a charge in excess of the usual or normal amount: an additional tax, cost, or impost.").

Thus, section 518 is correctly interpreted to apply only to "single-sticker-price schemes," Pet. Br. at 25—where a seller posts a single "sticker" price for a product but then demands a higher-than-posted price from credit-card customers at the point of sale. As Congress explained in connection with section 518's federal Truth in Lending Act ("TILA") predecessor, a law against "surcharge[s]" is by any ordinary understanding a prohibition against "increasing the regular price" of a good or service above "the tag or posted price ... *if a single price is tagged or posted.*" 15 U.S.C. § 1602(q), (x) (1982) (emphasis added); *see also id.* § 1666f(a)(2); Resp. Br. at 22 ("By its plain terms, [section 518] prohibits sellers from collecting additional money, in excess of the usual or regular price, from consumers who pay with a credit card."); U.S. Br. at 15 (Section 518 "prohibits a merchant who posts a single price for an item from charging more than the posted price to a customer who elects to pay by credit card rather than cash."); Ahold Br. at 24

(describing section 518 as "prohibit[ing] merchants from surcharging credit transactions at the point of sale.").

Properly interpreted then, section 518 regulates "conduct, not speech," because "[i]t affects what [persons] must *do* ... not what they may or may not *say*." *FAIR*, 547 U.S. at 60. Sellers may still engage in truthful advertising about their lawfully determined prices, *cf. Va. State Bd. of Pharm.*, 425 U.S. at 773, and remain free to say anything they like about credit-card "swipe fees." Sellers also remain free to use and advertise differential pricing schemes for credit-card and cash customers. *See* Resp. Br. at 30-31. All a seller may *not* do is engage in the conduct of charging credit-card customers a higher-than-posted price at the point of sale. And although that forbidden action is "carried out by means of language," *Giboney*, 336 U.S. at 502, its prohibition no more implicates the First Amendment than forbidding fraud or "agreements in restraint of trade." *Id.*

Petitioners and their *amici* make two arguments for treating section 518 as a speech regulation, neither of which has merit.

First, seeking to avoid the straightforward conclusion that section 518 regulates conduct rather than speech, Petitioners insist that the statute is aimed at speech because it also bars the use of "dual prices," *i.e.*, posting one price for cash buyers and a different, higher price for credit-card buyers. But the plain terms of section 518 do not prohibit "dual pricing." *See* Resp. Br. at 30-31. As previously discussed, the ordinary meaning of "surcharge" is an extra sum added to the "usual" price. *See supra* p. 11. Where a merchant displays two prices for the same product, the merchant is not adding a sum to the

"usual" price by charging a customer one of those two prices—both prices could be characterized as a "usual" price. Respondent thus correctly construes section 518, like TILA before it, to apply only when a seller posts a single regular price for a particular product. Resp. Br. at 28; *see also* 15 U.S.C. § 1602 (q), (x) (1982).[2]

Second, Petitioners and their *amici* urge the Court to hold that section 518 implicates the First Amendment because it affects how sellers "communicate the added cost" to their customers. Pet. Br. at 5; *see also, e.g.*, Ahold U.S.A., Inc. Br. at 19. But while communicating the fact of the extra fee may be a "component" of imposing it, *Ohralik*, 436 U.S. at 456, that fact does not prevent the State from restricting the particular pricing *practice* of imposing a surcharge. *See id.*; *see also Sorrell*, 564 U.S. at 567; *Giboney*, 336 U.S. at 502. "[D]espite their verbal character," the words used to accomplish a forbidden point-of-sale surcharge are "essentially a 'nonspeech' element of communication" that have no constitutional salience. *R.A.V.*, 505 U.S. at 386.

For similar reasons, the United States is wrong in arguing that section 518 regulates speech because it affects how merchants "communicate" their pricing schemes—that is, because it affects what price a merchant may display on a price tag. *See* U.S. Br. at 19. No one disputes that the state may lawfully regulate the prices themselves and the relationship between prices. *See, e.g.*, *44 Liquormart*, 517 U.S. at

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[2] Even if Respondent's reading of section 518 were not the only plausible one, this Court should reject Petitioners' invitation to construe the statute in a manner that could create a constitutional question. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

507 (plurality op.); *id.* at 525 (Thomas, J., concurring in part and concurring in judgment); *id.* at 530 (O'Connor, J., concurring in judgment). And because the state may dictate what price can be charged, the state necessarily may regulate the price a merchant may write on a price tag. In other words, just as the state could prohibit a merchant from writing $10 on a price tag for a product that the state mandates be sold at minimum for $20, the state may also prohibit merchants who intend to charge credit card customers $103 from posting $100 as the sole price and then charging an extra $3 at the point of sale. *See* U.S. Br. at 19. Section 518 forbids conduct (charging an extra $3 at the point of sale when the price posted was only $100) the same way that a minimum price regulation forbids conduct (charging $10 when the legal minimum is $20). That both laws affect what dollars-and-cents price may legally be written on the price tag is thus wholly outside the First Amendment's concern. *Cf. Va. State Bd. of Pharm.*, 425 U.S. at 773.

Unless premised on a misreading of the statute as applicable to dual pricing, then, a ruling for Petitioners would mean striking down a restriction on conduct – the act of charging a customer more than the posted, regular price at the point of sale – simply because that conduct is carried out in part through speech. While a merchant might believe that imposing a surcharge at the point of sale would be a more "effective" means of "drawing attention to the cost of credit," Pet. Br. at 30, the First Amendment does not bar the State from making the policy judgment that such *conduct* is "harmful to the public." *Ohralik*, 436 U.S. at 456. A bank robber fancying himself a real-life Robin Hood might believe that robbing financial institutions is the most effective

way to draw attention to wealth inequality, but that does not mean laws proscribing robbery implicate the First Amendment—even though they may thwart Robin's preferred way of getting his message across. *Cf. R.A.V.*, 505 U.S. at 385 ("expressive activity can be banned because of the action it entails, [though] not because of the ideas it expresses").

In sum, precedent requires holding that section 518 (properly interpreted as applying only to single-sticker-price schemes) regulates conduct rather than speech and is therefore subject only to rational-basis review.[3]

C. A ruling that section 518 regulates speech would enmesh courts in policy disputes best left to the legislative branch.

For nearly eighty years, this Court has declined to rely on constitutional doctrines to scrutinize the political branches' justification for ordinary economic regulation. "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of*

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[3] While the above precedents make clear that freedom of speech is not implicated by a state's regulation of the price of a product or service, *amici* acknowledge that regulation of other sums may in some circumstances implicate the First Amendment. Certain restrictions on payments to expressive organizations could, for example, implicate the freedom of association. *Cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658 (2000) ("[I]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment." (quoting *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987)). Freedom of association is of course not at issue in this case.

Oklahoma Inc., 348 U.S. 483, 488 (1955).

Instead, this Court has recognized that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose." *Nebbia*, 291 U.S. at 537. "Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment." *W. Coast Hotel*, 300 U.S. at 399.

The rule of judicial restraint in the realm of ordinary economic regulation is animated by the recognition that, "[e]ven where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government." *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 553 (1949) (Frankfurter, J., concurring). Accordingly, it is now black-letter law that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

These same principles also animate the conduct-speech distinction. If it were true that the First Amendment required searching judicial review of every law that burdens communicative acts, then the First Amendment would inevitably become the same scourge of regulation that the Fourteenth once was. Rather than a nebulous "freedom of contract," an unduly expansive concept of free speech would authorize courts to strike down all manner of legislation. The Court would "return[] to the bygone

era of *Lochner v. New York*, 198 U.S. 45 (1905), in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting).

Petitioners may disclaim any desire to undermine the conduct-speech distinction, but there is no principled way to distinguish section 518 from many other statutes with a similarly attenuated relationship to speech. New York's surcharge ban is not meaningfully different, for example, from a law banning agreements in restraint of trade. *Cf., e.g.*, 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade ... is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony...."). The acts prohibited by both kinds of laws are accomplished through communication between actors, *i.e.*, the co-conspirators in the case of agreements in restraint of trade and the seller and buyer in the case of surcharges. The purpose of both laws is to forbid the activity that the legislature has deemed harmful, either restraining trade or imposing a surcharge. And both kinds of laws affect only such communications as would actually accomplish the forbidden conduct—*i.e.*, the "nonspeech" words employed in committing the act of conspiring or of surcharging. *R.A.V.*, 505 U.S. at 386.

"Certainly the constitutionality of the antitrust laws is not open to debate," *California Motor*

Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972), but if the Court rules for Petitioners, it will invite debate on precisely that question.

Indeed, Petitioners' and their *amici*'s arguments show how dangerous a path the Court walks. Some *amici* rail that New York's anti-surcharge ban should be invalidated because it leads to "retailers charging a higher baseline price for both cash and credit users," such that cash customers subsidize credit-card users who may be wealthier overall. Cato Inst. Br. at 9. Similarly, Petitioners complain that because of their *own* decision to pass "swipe fees" along by raising prices across the board, cash purchasers are in effect "subsidiz[ing] the cost of credit cards." Pet. Br. at 7-8. Other *amici* object that "customers who choose to pay with credit cards" are not "required to bear the marginal cost of their expensive payment method." Ahold U.S.A., Inc. Br. at 24. Still others opine that surcharge bans "decrease consumer welfare." Consumer Action Br. at 11. And Petitioners explain that they want to be able to impose surcharges because "surcharges are far more effective than discounts" at discouraging credit card use. Pet. Br. at 31.

But it should be irrelevant that the law may be undesirable from Petitioners' preferred policy perspective. The economic soundness or "social undesirability" of the challenged law is of no moment to this Court. *Am. Sash & Door Co.*, 335 U.S. at 553 (Frankfurter, J., concurring); *see also W. Coast Hotel*, 300 U.S. at 399. Courts do not "sit as ... superlegislature[s]" to weigh "the wisdom or policy of legislation." *N. Dakota State Bd. Of Pharm. v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 165 (1973) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731

(1963)); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, J., dissenting) (quoting *Lochner v. New York*, 198 U.S. 45, 69 (1905) (Harlan, J., dissenting)). "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson*, 348 U.S. at 488.

Again and again in the years since *West Coast Hotel* this Court has "emphatically refuse[d] to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'" *N. Dakota State Bd. of Pharm.*, 414 U.S. at 165 (quoting *Ferguson*, 372 U.S. at 731). Yet Petitioners and their *amici* would have this Court do precisely that, only using the First Amendment instead of the Fourteenth. The Court would thus "reawaken[] *Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue." *Sorrell*, 564 U.S. at 603 (Breyer, J., dissenting).

D. A ruling for Petitioners would invite constitutional challenges to a wide swath of ordinary economic and social legislation.

If this Court were to undermine the conduct-speech distinction by determining that section 518 regulates speech even if it applies only to single-sticker-price schemes, many laws not previously thought to raise constitutional questions would be subject to First Amendment challenge.

Laws forbidding workplace harassment or housing discrimination, for example, would arguably present

constitutional questions because the proscribed discrimination is usually effectuated through speech. *Cf. FAIR*, 547 U.S. at 62 (relying on the current conduct-speech distinction for the proposition that "Congress ... can prohibit employers from discriminating in hiring on the basis of race ... [even if] this will require an employer to take down a sign reading 'White Applicants Only' ...." (citing *R.A.V.*, 505 U.S. at 389)). In fact, at least one lower court has already suggested that the First Amendment might bar a Title VII sexual harassment claim where the plaintiff's proof included derogatory comments circulated widely by a male coworker, who also reminisced about the "good ol' days" before women joined the workforce, compared female coworkers to dogs, and opined that they were less qualified than men to do the job. *See DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594-96 (5th Cir. 1995).

Other ordinary social and economic legislation would be similarly threatened by a ruling for Petitioners. If section 518 were held to burden speech, "[n]umerous examples ... of [other] communications that are [currently thought to be] regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees" could also be called into question. *Ohralik*, 436 U.S. at 456 (citing *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)).

Applying First Amendment scrutiny to any regulation that burdens an instance of the spoken or written word would also have profoundly antiregulatory effect in the "information age," when the marketplace is increasingly saturated with information products. Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 U. Tex. L. Rev. 1427, 1446 (2016).

Lower courts have already fallen into the trap of concluding the First Amendment applies to speech *qua* speech, notwithstanding this Court's longstanding conduct-speech distinction. In *Nordyke v. Santa Clara County*, 110 F.3d 707 (9th Cir. 1997), for example, the Ninth Circuit determined that a county's addendum to its lease with a commercial fairground operator that prohibited any person from "selling" or "from offering for sale ... firearms or ammunition to any other person at a gun show at the fairgrounds" implicated the First Amendment. *Id.* at 710. Although the court recognized that "the act of exchanging money for a gun is not 'speech' within the meaning of the First Amendment," the court concluded that the act of "offering for sale" was "commercial speech" because such action constituted a proposal of a commercial transaction. *Id.* (citing *Va. State Bd. of Pharm.*, 425 U.S. at 762) (emphasis added).

"But of course any sale or contract involves the communicative elements of offer and acceptance." Shanor, *supra*, at 182. And because "offer and acceptance are communications incidental to the regulable transaction called a contract," it has long been the rule that regulating such literal communications no more implicates the First Amendment than would regulating the terms or

performance of the contract itself. *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring). If the county could lawfully prohibit the act of completing a transaction ("selling"), then surely the county could also prohibit the act of initiating that same transaction ("offering for sale"). *Nordyke*, 110 F.3d 708-09. Cases like *Nordyke* will surely abound if the Court were to undermine the conduct-speech distinction by ruling in Petitioners' favor.

Nor is the challenge in *Nordyke* an outlier. Litigants recently brought a First Amendment challenge to a statute that "regulate[d] individuals and entities that hold themselves out to the public as willing to purchase precious metals," on the theory that "holding oneself out" constituted protected commercial speech. *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 691, 692 (6th Cir. 2014), *cert. denied sub nom. Liberty Coins, LLC v. Porter*, 135 S. Ct. 950 (2015). Others challenged on First Amendment grounds a law that distinguished between "large" and "small" businesses in determining how much time a business would have to come into compliance with minimum wage increases, on the theory that the law burdened the contractual franchise agreements that pushed some businesses into the "large" category. *See Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408-09 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1838 (2016).

These examples demonstrate

> the increasing and broadening use by corporations of challenges under the First Amendment to laws and regulations generally, and especially and increasingly laws that do not constrain expressive businesses (such as media companies), but any communicative or expressive activity of any

> business, no matter how incidental to the purpose and goals of the business, and no matter how little any ordinary individual (even a shareholder or employee of the business) might care about the expression in question.

John C. Coates IV, *Corporate Speech and The First Amendment: History, Data, and Implications*, 30 Const. Comment. 233, (2015).

Still other regulations of the marketplace would also be called into question by a ruling for Petitioners. First Amendment challenges could be brought to laws regulating or imposing substantive licensure requirements on the practice of professions in which communication plays an important role. For example, "[m]ost, if not all, medical and mental health treatments require speech." *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir.), *cert. denied*, 134 S. Ct. 2871 (2014), *and cert. denied sub nom. Welch v. Brown*, 134 S. Ct. 2881 (2014). And most, if not all, of an attorney's work takes the form of speech. *See id.* at 1228.

Most courts have to date relied on the conduct-speech distinction to uphold regulation of communicative professions, on the theory that, "[j]ust as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession." *Lowe*, 472 U.S. at 232 (White, J., concurring). Under the current conduct-speech distinction, holding a lawyer liable for malpractice does not implicate the First Amendment even though the attorney's incompetence is demonstrated in written or oral work product. *Cf. Pickup*, 740 F.3d at 1228. And doctors may be "held liable for giving negligent medical advice to their

patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care." *Id.*

For similar reasons, most courts currently hold that "[i]f the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny." *Lowe*, 472 U.S. at 232 (White, J., concurring). Where the government adopts such licensing requirements, it is regulating the conduct of the profession, even if the profession itself is conducted through speech. *See id.*; *cf. also Pickup*, 740 F.3d at 1229. If the rule were otherwise, then the states' universal requirement that aspiring lawyers pass the bar exam would be subject to First Amendment scrutiny, since practicing law is paradigmatically communicative. But a decision that undermines the conduct-speech distinction—as a decision for Petitioners inevitably threatens—puts these holdings at risk. *Cf. Pickup*, 740 F.3d at 1229; *compare also Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (invalidating ordinance requiring licensure of tour guides on First Amendment grounds) *with Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014) (reaching opposite conclusion), *cert. denied*, 135 S. Ct. 1403, (2015).

If Petitioners succeed in undermining the conduct-speech distinction in this case, other litigants will surely bring First Amendment challenges to regulations with which they disagree, on the theory that the regulations affect some form of literal speech. And district and appellate courts will struggle to find a meaningful way to determine which laws are

exempt from constitutional scrutiny and which must be subject to some form of searching judicial review, with the likely result that many laws currently held to regulate conduct will instead be struck down as impermissible regulations of speech. A ruling for Petitioners would thus "involve consequences of a far-reaching and mischievous character; for such a decision would seriously cripple the inherent power of the states to care for the lives, health, and wellbeing of their citizens." *Lochner v. New York*, 198 U.S. 45, 73 (1905) (Harlan, J., dissenting).

II. EVEN IF SECTION 518 IS INTERPRETED AS A REGULATION OF SPEECH, IT SHOULD BE SUBJECT TO DEFERENTIAL SCRUTINY.

A. For good reason, this Court has long held that commercial speech merits lesser protection than political speech.

Since the time the First Amendment's protections were first held to extend to commercial speech, this Court has recognized that "a different degree of protection is necessary" for that category of expression. *Va. State Bd. of Pharm.*, 425 U.S. at 770, 771 n.24; *see also Central Hudson*, 447 U.S. at 562. "Commercial speech ... is linked inextricably with the commercial arrangement that it proposes, so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (internal quotation marks omitted). In other words, "commercial speech doctrine ... represents an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the sales *of* such goods and services." *44 Liquormart*, 517 U.S. at

499 (plurality op.) (internal quotation marks omitted; emphasis in original).

For these reasons, the Court "developed a framework for analyzing regulations of commercial speech that is 'substantially similar' to the test for time, place, and manner restrictions." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (quoting *Central Hudson*, 447 U.S. at 562). Under this standard, restrictions upon truthful and nonmisleading commercial speech are subject to a form of intermediate scrutiny. *Edenfield*, 507 U.S. at 767. ("[L]aws restricting commercial speech ... need only be tailored in a reasonable manner to serve a substantial state interest ...."). The Court "ha[s] not insisted that there be no conceivable alternative" to a challenged restriction of commercial speech, only that the regulation "not burden substantially more speech than is necessary to further the government's legitimate interests." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989) (internal quotations omitted).

Commercial speech is also "subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'" *Id.* at 477 (quoting *Ohralik*, 436 U.S. at 456). That the nature of commercial speech renders it more readily susceptible of verification, and more durable, permits the state to compel certain speech (such as warnings or disclaimers) and obviates the need for certain constitutional rules (such as overbreadth and prior restraint doctrines). *See Va. State Bd. of Pharm.*, 425 U.S. at 772 n.24; *Ohralik*, 436 U.S. at 463 n.20; *Central Hudson*, 447 U.S. at 564 n.6.

Certain laws intended to prevent confusing or deceptive commercial speech are subject to an even

more deferential reasonableness analysis. Among the "well settled" First Amendment principles are that "[t]he States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985); *see also Central Hudson*, 447 U.S. at 563 ("The government may ban forms of communication more likely to deceive the public than to inform it."); *R.A.V.*, 505 U.S. at 388 ("risk of fraud" is among "the characteristics of commercial speech that justif[y] depriving it of full First Amendment protection"). "The First Amendment ... does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely." *Va. State Bd. of Pharm.*, 425 U.S. at 771-72.

As recently as 2010, this Court reaffirmed that required disclosures are subject to "the less exacting scrutiny described in *Zauderer*." *Milavetz, Gallop & Milavetz, PA v. United States*, 559 U.S. 229, 249 (2010). That standard demands only that the mandated disclosures be "reasonably related" to the government's interests in preventing consumer confusion or deception. *Id.* at 250 (quoting *Zauderer*, 471 U.S. at 651).

Thus, it does not offend the First Amendment to "'require that a commercial message appear in such a form ... as [is] necessary to prevent its being deceptive.'" *Friedman v. Rogers*, 440 U.S. 1, 10 (1979) (quoting *Va. State Bd. of Pharm.*, 425 U.S. at 775-81) (alterations in original). Laws that require disclosures in order to prevent consumer confusion or deception "'trench much more narrowly'" on core First Amendment interests, and so are subject to relatively

deferential review. U.S. Br. at 22 (quoting *Zauderer*, 471 U.S. at 651).

A single-sticker-price surcharge ban operates to vindicate the government's interest in preventing consumer confusion and deception by requiring merchants to disclose the total dollar-and-cents price that credit card customers will pay, at a time before they are actually purchasing the product. *See* Resp. Br. at 54-55. It requires that customers receive more, not less, information. If treated as regulating speech, section 518 should thus be upheld as long as the mandated disclosure is "*reasonably related* to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651 (emphasis added). Because the danger that credit card customers will believe they will have to pay only the posted sticker price is "self-evident," there is no need for the State to submit further evidence that the prohibited surcharge practice is misleading in order to demonstrate the law's constitutionality. *Milavetz*, 559 U.S. at 251.

B. Overturning this Court's well-established commercial speech doctrine, as Petitioners' *amici* urge, would be a dangerous and unwarranted departure from longstanding precedent.

Petitioners confine their arguments to the application of existing legal standards, and urge the application of *Central Hudson*'s intermediate scrutiny standard. Pet. Br. at 27-28, 36. But their *amici* go much further, urging this Court to subject commercial speech regulations to strict scrutiny if they draw distinctions based on content. *See, e.g.*, Ahold U.S.A., Inc. Br. at 4, 11-12, 15-16; Cato Institute Br. at 10-13. Such a ruling would discard decades of settled

precedent and render it nearly impossible for the government to protect consumer interests.

Petitioners' *amici* claim to find support for this direction in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), but the speech at issue in *Reed* was not commercial. *See id.* at 2231. *Reed* did not address commercial speech or cite the main commercial speech cases at all, and the Court therefore had no need to address Justice Breyer's admonition that subjecting content-based regulations of commercial speech to strict scrutiny would "write a recipe for judicial management of ordinary government regulatory activity." *Id.* at 2234 (Breyer, J., concurring in judgment).

That admonition highlights the fundamental problem that would result from strict scrutiny of all content-based regulation of commercial speech. As Justice Breyer noted, "[r]egulatory programs almost always require content discrimination." *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring in judgment). Of course that *must* be true, because of the very definition of content-based restrictions: "Government regulation of speech is content based if a law applies to particular speech *because of the topic discussed* or the idea or message expressed." *Reed*, 135 U.S. at 2227 (emphasis added). Laws requiring specified warnings on cigarettes, prohibiting the marketing of certain food products as organic or low-salt, mandating disclosures of conflicts of interest in fiduciary relationships, compelling disclosures of certain provisions in mortgage contracts, and forbidding off-label marketing of pharmaceutical drugs are all triggered by the topic addressed, and would therefore all be subject to strict scrutiny under Petitioners' *amici*'s proposed new rule.

That warning should be heeded here. If content-based burdens upon commercial speech were subject to strict scrutiny, the government would lose its ability to protect consumers against confusion or deception. Laws requiring warnings or disclosure of facts necessary to avoid confusion or danger about drugs, food, or other subjects, or prohibiting misleading forms or means of advertising about certain topics, would be invalidated unless courts agreed with the legislative or regulatory determination of the importance of the problem addressed and that the methods chosen were the least restrictive.

Strict scrutiny applies to noncommercial content-based distinctions because of the danger that such content-based distinctions could disguise laws that in reality disfavor certain viewpoints, and thereby "interfere with democratic self-government and the search for truth." *Reed*, 135 S. Ct. at 2233 (Alito, J., concurring); *see also id.* at 2229 (noting danger that "future government officials may" use content-based laws "to suppress disfavored speech"). Here, where the speech at issue is indisputably commercial, and the law addresses pricing schemes without interfering with consumers' ability to receive accurate information or with a merchant's speech on issues such as the evils of credit card companies, there is no similar justification for strict scrutiny. *Cf. Va. State Bd. of Pharm.*, 425 U.S. at 771 n.24.

Nor does *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), support applying strict scrutiny to all commercial speech. *Sorrell* employed "heightened scrutiny" to evaluate a law prohibiting certain speakers from making specified uses of information, but did not make clear whether that standard was a

version of *Central Hudson*'s intermediate review, strict scrutiny, or something in between. *See id.* at 565. In fact, *Sorrell* concluded that the result would be the same even if the *Central Hudson* standard applied, rendering it unnecessary to decide whether stricter scrutiny was appropriate. *Id.* at 571-72.

Even more relevant here, *Sorrell* addressed a law that prohibited a subgroup of disfavored speakers from utilizing lawfully available information, for the purpose of suppressing viewpoints to which the State was hostile. *See id.* at 563-64 ("The law on its face burdens disfavored speech by disfavored speakers."); *id.* at 567 (law was "aimed at particular speakers" and imposed burdens based on "the identity of the speaker"). The law itself made that purpose explicit. *Id.* at 565 ("Given the legislature's expressed statement of purpose, it is apparent that § 4631(d) imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint.").

Whether treated as a mandatory disclosure law or (more appropriately) as a prohibition on certain pricing schemes, section 518 is not analogous to the law at issue in *Sorrell*. Section 518, unlike that law, is not designed to suppress a disfavored message that conflicts with the state's goals. Section 518 does not restrict speech about "swipe fees" or a merchant's pricing practices, and in fact enhances, rather than suppresses, consumer access to information. It does so by requiring disclosure of the full dollar-and-cents price that credit-card customers will pay, which both enables consumers to easily compare prices across merchants and also helps avoid the kinds of consumer deception or confusion that might flow from consumers being charged more than the posted price

at the point of sale. Thus, unlike *Sorrell*, this case involves a statute with a legislative purpose of enhancing, rather than preventing, access to valuable information. A purpose of preventing such access was critical in *Sorrell* and may warrant heightened scrutiny in other cases. *Cf. Sorrell*, 564 U.S. at 566 (consumers' interest in information is strong; in medicine and public health fields, "information can save lives"); *Central Hudson*, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising.").

That the merchants in this case also wish to convey a message through the action of imposing a surcharge does not change the constitutional analysis. The law does not restrict merchants from speaking out against or educating their customers about the cost of credit cards. And this Court long ago rejected the notion that commercial speech "link[ed] ... to a current public debate" would thereby be entitled to greater protections. *Central Hudson*, 447 U.S. at 563 n.5; *see also Fox*, 492 U.S. at 475. Because the protection for commercial speech rests upon listeners' interest in the free flow of information, not the autonomy interest of speakers, *Va. State Bd. of Pharm.*, 425 U.S. at 764, a commercial actor's desire to utilize certain mechanisms to amplify its speech does not require constitutional invalidation.

As previously discussed, *see supra* section I.B, Petitioners' and their *amici*'s focus on the policies implicated by section 518 make clear why heightened scrutiny of commercial speech would return courts to the *Lochner* era. One set of *amici*, for example, argue that the State is wrong to conclude that consumers will be deceived by the imposition of credit card surcharges at the point of purchase, that it has other

mechanisms to prevent this kind of deception, and that allowing surcharges would actually benefit consumers and the market economy. Consumer Action Br. at 12-16, 18-19; *see also* Cato Inst. Br. at 3-10 (calling section 518 a form of "cronyism" and complaining about its policy results); Ahold U.S.A., Inc. Br. at 6-7, 23-31 (complaining of "massive negative impact on the national economy" and "massive market inefficiency"). Similarly, Petitioners protest that section 518 is unsound because "surcharges are far more effective than discounts at signaling to consumers the relative costs of a payment system." Pet. Br. at 31.

This sort of second-guessing of legislative and regulatory determinations is not the proper role for the courts. Rather, this Court has "provide[d] the Legislative and Executive Branches needed leeway in a field (commercial speech) 'traditionally subject to governmental regulation.'" *Fox*, 492 U.S. at 481 (quoting *Ohralik*, 436 U.S. at 455-56). Petitioners' and their *amici*'s suggestion that this Court should evaluate whether the New York legislature was *correct* in its policy judgment about credit-card surcharges threatens to unravel the longstanding judicial consensus that the role of courts "is only to determine the *reasonableness* of the Legislature's belief in the existence of evils and in the effectiveness of the remedy provided." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 286-87 (1932) (Brandeis, J., dissenting) (emphasis added).

The *Central Hudson* majority presumably rejected Chief Justice Rehnquist's dissenting admonition that granting First Amendment protection to commercial speech would bring back "the bygone era of *Lochner*" because of their conviction that applying *intermediate*

scrutiny would not reinstate "the common practice ... to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies." 447 U.S. at 589 (Rehnquist, J., dissenting). But that would be the necessary implication of Petitioners' *amici*'s call to require strict scrutiny of all content-based regulations of commercial speech. The Court should reject Petitioners' *amici*'s invitation to undermine the courts' legitimacy by turning back the clock to the age of that anticanon.

CONCLUSION

For the foregoing reasons, the Second Circuit's decision should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, ET AL.,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR ADAM J. LEVITIN IN SUPPORT OF PETITIONERS

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TABLE OF AUTHORITIES

Cases

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 827 F.3d 223 (2d Cir. 2016) 8

United States v. Am. Express Co., 838 F.3d 179 (2d Cir. 2016) 8

Statutes

7 U.S.C. § 2016 24

7 U.S.C. § 2016(h)(13) 24

15 U.S.C. § 1693o-2 6

Competition and Consumer Amendment (Payment Surcharges) Act 2016 (Feb. 25, 2016) 19

Conn. Gen. Stat. Ann. § 42-133ff(a) 3

Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on Payment Services 7

Fla. Stat. § 501.0117(2) 3

Minn. Stat. § 325G.051(1)(a) 16

N.Y. Gen. Bus. Law § 349 16

N.Y. Gen. Bus. Law § 350 16

N.Y. Gen. Bus. Law § 350-a 16

N.Y. Gen. Bus. Law § 518 3

Legislative Materials

127 Cong. Rec. 4228 (Mar. 12, 1981) 13

Cash Discount Act, 1981: Hearings Before the Subcommittee on Consumer Affairs of the S. Banking, Housing, and Urban Affairs Comm. on S. 414, 97th Cong. 9 (Feb. 18, 1981) 22

Regulations

12 C.F.R. § 235.5(a)(1) 6

12 C.F.R. § 235.3(b) 6

12 C.F.R. § 1005.16 16

Reserve Bank of Australia, Payment Systems (Regulation) Act 1998, Standard No. 3 of 2016: *Scheme Rules Relating to Merchant Pricing for Credit, Debit, and Prepaid Card Transactions* (2016), <bit.ly/2aBkBJM> 19

Other Authorities

AP, *House for Credit Card Fee Ban*, N.Y. Times, Apr. 4, 1984 13

Oren Bar-Gill, *Seduction by Plastic*, 98 Nw. U. L. Rev. 1373 (2004) 25

Bd. of Govs. of the Fed. Reserve Sys., *Average Debit Card Interchange Fee by Payment Card Network*, <bit.ly/2fQqCk8> 6

CHOICE, *Choice Report, Credit Card Surcharging in Australia* (2010), <bit.ly/1ACjSYt> 18

Amy Dawson & Carl Hugener, Diamond Mgmt. & Tech, Consultants, *A New Business Model for Card Payments* (2006), <bit.ly/2fE8jRq> 26

Meredith M. Fernstrom, Senior Vice-President—Public Responsibility, American Express Company, *The Corporation and the Consumer: Obligation or Opportunity?* Consumer Interests Ann. 353 (1988), <bit.ly/2goqvQi> 12

Maxwell Glen & Cody Shearer, *Credit card companies discrepancies found between television ads, letters mailed*, Univ. Press (Beaumont Texas), Apr. 12, 1984, <bit.ly/2g6rKky> 12

Fumiko Hayashi & Jesse L. Maniff, Fed. Reserve Bank of Kansas City, *Public Authority Involvement in Payment Card Markets: Various Countries* (Aug. 2016) (*Public Auth. Involvement*), <bit.ly/2g4jMe0> 7, 8

Paul Heidhues & Botond Köszegi, *Exploiting Naivete about Self-Control in the Credit Market*, 100 Am. Econ. Rev. 2279 (2010) 25

David Humphrey et al., *What does it Cost to Make a Payment?*, 2 Rev. of Network Econ. 159 (2003) 6

Edmund W. Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217 (1990). 10

Memo from Kate Krell, July 24, 1987, <bit.ly/2fLyUNB> 12

Adam J. Levitin et. al., *The Dodd-Frank Act and Housing Finance: Can It Restore Private Risk Capital to the Securitization Market?* 29 Yale J. on Reg. 155 (2012) 8

Adam J. Levitin, *Cross-Routing: PIN and Signature Debit Interchangeability Under the Durbin Amendment*, 2 Lydian J. 16 (Dec. 2010) 1

Adam J. Levitin, *Payment Wars: The Merchant-Bank Struggle for Control of Consumer Payment Systems*, 12 Stan. J.L. Bus. & Fin. 425 (2007) 1

Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321 (2008) 1, 12, 20, 22

Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv. J. on Legis. 1 (2008) 1, 22, 23, 25

Adam J. Levitin, *Private Disordering? Payment Card Fraud Liability Rules*, 5 Brook. J. of Corp. Fin. & Comm. L. 1 (2010) 1

Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265 (2005) 1

Adam J. Levitin, *The Merchant-Bank Struggle for Control of Payment Systems*, 17 J. Fin. Transformation 73 (2006) 1

Robert D. Manning, *Credit Card Nation: the Consequences of America's Addiction to Credit* 127 (2000) 25

Merchants Payments Coalition, *Reforming Credit Card Swipe Fees to Grow Our Economy* (2015) (*Reforming Card Swipe Fees*), <bit.ly/2fae2Ox> 7, 20

Nat'l Conf. of State Legis., Restrictions on Use of Public Assistance Electronic Benefit Transfer (EBT) Cards (2015), <bit.ly/2goEFRI> 24

Robin Prager et al., Fed. Reserve Bd., Div. of Research & Statistics & Monetary Affairs, *Interchange Fees and Payment Card Networks Economics, Industry Developments, and Policy* Issues (2009), <bit.ly/2f8peHS> 6

Drazen Prelec & Duncan Simester, *Always Leave Home Without It: A Further Investigation of the Credit-Card Effect on Willingness to Pay*, 12 Marketing Letters 5 (2001) 25

Reserve Bank of Australia, *Average Merchant Fees for Debit, Credit and Charge Cards, Statistical Table C3, Series CMFCBMVT and CMFCAET* (Nov. 2016), <bit.ly/2f8RpXt> 21

Reserve Bank of Australia, *Review of Payment Card Regulation, Conclusions Paper* (May 2016), <bit.ly/2g4Icnz> 18, 19

Reserve Bank of Australia, *Review of Payment Card Regulation, Consultation Paper* (Dec. 2015), <bit.ly/2g3y8Yr>, ... 18

Scott Schuh et al., *An Economic Analysis of the 2010 Proposed Settlement Between the Department of Justice and Credit Card Networks* (Fed. Reserve Bank of Boston, Public Policy Discussion Paper No. 11-4, 2011), <bit.ly/2fGYFOc> 9

Teresa A. Sullivan et al., *the Fragile Middle Class: Americans In Debt* (2000) 25

Tipik Commc'ns Agency, *Directive 2007/64/EC – General Report on the Transposition by the Member States* (Aug. 2011) 7

E. Vis & J. Toth, ITM Research, *The Abolition of the No-Discrimination Rule, Report for European Commission Directorate General Competition* (2000), <bit.ly/2g4QTM9> 9

VISA USA Interchange Reimbursement Fees 8 (Apr. 18, 2015), <vi.sa/2fpv1Km> 23

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Adam J. Levitin is a Professor of Law at the Georgetown University Law Center. He previously served as the Bruce W. Nichols Visiting Professor of Law at Harvard Law School and on the Consumer Financial Protection Bureau's Consumer Advisory Board. Professor Levitin teaches courses in payment systems and consumer finance. He has also authored several scholarly articles regarding credit-card surcharges, including on the ways such surcharges influence consumer behavior, and on lawmaking efforts, undertaken at the behest of the credit-card industry, to prevent merchants from using surcharges.[2] His works have been cited by the petitioners in this Court, by both the challengers and the states in the Second, Fifth, and Eleventh Circuits, and by the courts

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity other than *amicus* or his counsel has made a monetary contribution to the preparation or submission of this brief.

[2] Adam J. Levitin, *Private Disordering? Payment Card Fraud Liability Rules*, 5 Brook. J. of Corp. Fin. & Comm. L. 1 (2010); Adam J. Levitin, *Cross-Routing: PIN and Signature Debit Interchangeability Under the Durbin Amendment*, 2 Lydian J. 16 (Dec. 2010); Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321 (2008) (*Economic Costs*); Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv. J. on Legis. 1 (2008) (*Social Costs*); Adam J. Levitin, *Payment Wars: The Merchant-Bank Struggle for Control of Consumer Payment Systems*, 12 Stan. J.L. Bus. & Fin. 425 (2007); Adam J. Levitin, *The Merchant-Bank Struggle for Control of Payment Systems*, 17 J. Fin. Transformation 73 (2006); Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265 (2005).

themselves in those cases.

Amicus submits this brief to lend further support to the observations in the behavioral-economics scholars' *amicus* brief, which he adopts, and to offer the benefit of his own expertise concerning the specific behavioral dynamics and consumer-protection issues at play in credit-card surcharging. He takes no position on whether the merchant advertising practices at issue in this case constitute speech, or on whether laws limiting those practices violate the First Amendment.

SUMMARY OF THE ARGUMENT

It costs money to get paid. Merchants accept payments from consumers through a variety of methods: cash, checks, credit cards, debit cards, electronic benefit transfers, and automated clearing-house transfers. Each of these payment methods causes merchants to incur expenses, sometimes in the form of per-transaction "swipe fees," and sometimes in other ways. And some payment methods, such as credit cards, are significantly more expensive for merchants than others.

Like any other cost of doing business, merchants pass these costs of payment onto their customers, and some logically wish to impose these increased marginal costs solely on those customers who cause them to be incurred—by charging customers paying with credit a higher price than those paying in cash. All states allow such differential pricing, but some restrict how merchants may *describe* the differential price to their customers. Under the "no surcharge" laws in New York and several other states, merchants may offer "discounts" to consumers who pay with cash, but they are prohibited from imposing "surcharges" for credit-card payments (or in Connecticut for

any non-cash form of payment, Conn. Gen. Stat. Ann. § 42-133ff(a)). Thus, in states with no-surcharge laws, a merchant could advertise a regular price of $100 and offer a $3 cash discount, but could not advertise a regular price of $97 with a $3 surcharge for credit—and in some states a merchant will face criminal penalties for characterizing the transaction incorrectly. *E.g.*, N.Y. Gen. Bus. Law § 518; Fla. Stat. § 501.0117(2).

It is not merely that these speech codes create traps for the unwary, however. Restricting merchants' word-choice matters because it deeply influences consumer behavior. Although discounts and surcharges are mathematically equivalent ways of representing the relationship between two prices, there are important behavioral and communicative distinctions between them that make it far more effective communication for merchants to call a price differential a surcharge than a discount. Not only does the surcharge label more accurately convey that using a credit card *costs more* than cash. But psychologically, consumers have strong negative reactions to surcharges, and only mild positive reactions to discounts. A surcharge thus communicates a much more powerful incentive. Other practical considerations might also cause merchants to prefer to characterize the price differential as a surcharge rather than a discount—for instance, unlike a surcharge, offering discounts requires merchants to raise their advertised base prices, which puts them at a competitive disadvantage to merchants offering no such discount. Such factors effectively force merchants in states with no-surcharge laws into offering "homogenized," single-tier pricing, irrespective of the consumer's method of payment. Accordingly, state no-surcharge laws effectively mute merchants' ability to communicate payment preferences

to consumers.

States claim that no-surcharging laws are motivated by a desire to protect consumers from supposed surcharging abuses, but this claim is belied by the history behind such laws, which reveals them instead to be protectionist legislation for the credit-card industry dressed in the clothing of consumer protection. Worse, the supposed consumer concerns asserted to justify these laws are themselves minimal and speculative, which is amply illustrated by an examination of the sales practices in other countries where surcharges have long been permitted without particular controversy. And where true risks to consumers actually arise from surcharges, these are better addressed through narrower, more targeted laws.

Far from protecting consumers, the homogenized pricing that results from no-surcharge laws is actually harmful to many consumers' welfare. Homogenized pricing creates a regressive cross-subsidy from the generally less-affluent users of lower-cost payment systems to the generally more-affluent users of higher-cost payment systems. In its most extreme form, food-stamp consumers end up subsidizing first-class upgrades for users of rewards credit cards.

This cross-subsidy harms lower-income consumers by reducing their spending power, and even the corresponding benefits to usually more well-off credit-card users are limited. The subsidy encourages excessive use of credit cards, causing some credit-card users to incur unwarranted amounts of consumer debt. And when it comes to reward credit cards, which have significantly higher "swipe fees" even relative to other credit cards, the benefits are particularly attenuated, because less than half of the value gained through those higher fees is actually

shared with card users themselves in the form of rewards benefits—the majority is retained by credit card companies. Indeed, credit-card companies are the true beneficiaries of no-surcharge laws, but states' desire to protect those companies' profits provides insufficient justification for silencing merchants' speech.

ARGUMENT

I. No-surcharge laws mute legitimate merchant efforts to transmit important price signals to consumers.

No-surcharge laws exploit a natural human cognitive bias: the tendency to view a discount as less meaningful than a surcharge. By forcing merchants to communicate with customers in this less-meaningful language, these laws interfere with the free flow of information, depriving customers of important facts about the true costs involved in providing them with goods and services, and disrupting the incentives that would otherwise encourage the use of lower-cost payment mechanisms. The results are artificially inflated costs for merchants and consumers, and artificially inflated profits for credit-card companies.

Payment systems are the essential infrastructure of the modern economy—the "plumbing" for all movements of value in transactions. Merchants can offer a wide variety of payment mechanisms to facilitate customers' purchases, including cash, check, automated clearing-house (ACH) transfers, PIN-debit cards, signature-debit cards,[3]

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[3] Debit cards differ from credit cards in that all debit card payments draw upon funds in a consumer's deposit account. There are also different types of debit cards. A "PIN-debit" or "single-message" card allows a customer to authorize payment by inputting a PIN number,

and credit cards. None of these payment mechanisms is free, and the costs of some are quite high. A study done in 2000 calculated that for a $100 transaction, it costs merchants an average of $0.90 to accept cash, whereas a PIN-debit transaction would cost $0.80 cents, a check $0.80 cents, an automated clearing-house payment $1.00, and a signature-debit card or credit card $1.80. Humphrey, note 3, *supra*, at 163. These disparities have only increased over the last 16 years as the cost of accepting credit card and signature-debit cards has gone up, *see* Robin Prager et al., Fed. Reserve Bd., Div. of Research & Statistics & Monetary Affairs, *Interchange Fees and Payment Card Networks Economics, Industry Developments, and Policy* Issues 75, fig. 3 (2009), <bit.ly/2f8peHS>, while the cost of accepting most PIN-debit cards has gone down as the result of regulatory caps, 15 U.S.C. § 1693o-2; 12 C.F.R. § 235.3(b).[4] Moreover, there can be significant cost differentials even within particular payment methods. For

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and the funds transfer goes through a regional ATM network. A holder of a "signature-debit" or "dual-message" card authorizes payment with a signature, like a credit card, and the funds transfer goes through MasterCard's or Visa's network. The cost structures of PIN-debit and signature-debit are also different—with swipe fees for signature-debit cards (which are not regulated under the Durbin Interchange Amendment, codified at 15 U.S.C. § 1693o-2) closer to those of credit cards. *See* Bd. of Govs. of the Fed. Reserve Sys., *Average Debit Card Interchange Fee by Payment Card Network*, <bit.ly/2fQqCk8> (reporting that the average unregulated signature-debit fee is 1.39% of transaction value, compared to 0.65% for PIN-debit); David Humphrey et al., *What does it Cost to Make a Payment?*, 2 Rev. of Network Econ. 159, 163 (2003), <bit.ly/2fKVum5> (reporting that average credit card swipe fees are 1.8% of transaction value).

[4] The major exclusion is for debit cards issued by banks with less than $10 billion in assets. 12 C.F.R. § 235.5(a)(1).

instance, among credit cards, which are already the most expensive consumer payment method, those with rewards programs are far more expensive than those without rewards—largely because of the additional cost associated with the bundled rewards program.

Although the cost differences may be relatively small for individual transactions, when the fees assessed on each of the transactions taking place in the United States are aggregated, the differences amount to tens of billions of dollars annually. Indeed, the cost of accepting payment is one of the largest (and fastest growing) operating costs for American merchants, Merchants Payments Coalition, *Reforming Credit Card Swipe Fees to Grow Our Economy* 2 (2015) (*Reforming Card Swipe Fees*), <bit.ly/2fae2Ox>, a factor that reduces American merchants' competitiveness relative to merchants in foreign nations that allow surcharges.[5]

Given the cost differences among payment instruments, merchants logically desire to incentivize the use of cheaper payment instruments, *ceteris paribus*, and the

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[5] Credit-card surcharges have been permitted for over a decade in Australia, Israel, the Netherlands, Sweden, Switzerland, and the United Kingdom, Fumiko Hayashi & Jesse L. Maniff, Fed. Reserve Bank of Kansas City, *Public Authority Involvement in Payment Card Markets: Various Countries* (Aug. 2016) (*Public Auth. Involvement*), <bit.ly/2g4jMe0>, and are also permitted in seventeen of the twenty-seven European Nation member states under Article 52(3) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on Payment Services, *see* Tipik Commc'ns Agency, *Directive 2007/64/EC – General Report on the Transposition by the Member States* 42 (Aug. 2011), <bit.ly/2g3cS4Y>.

most natural way for them to do so is through price signals. The price theory of demand—the idea that levels of demand respond to price signals—is the most basic building block of economics. *See, e.g.*, Adam J. Levitin et. al., *The Dodd-Frank Act and Housing Finance: Can It Restore Private Risk Capital to the Securitization Market?* 29 Yale J. on Reg. 155, 165 (2012). In other words, price is a language customers understand. Accordingly, merchants communicate information to their customers through the ways they frame the prices they charge, as well as through the kinds of services *for which* they charge. By adding a surcharge for credit, merchants can clearly communicate the marginal cost of using a credit card to their customers, and express their desire for customers to use cheaper payment mechanisms.

No-surcharge laws restrict merchants' ability to communicate these increased costs—and their preference for minimizing those costs—through price signals.[6] By permitting merchants to describe differential prices only in

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[6] Credit-card companies also include restrictions against surcharges in the terms they impose upon merchants seeking access to their payment networks. These network restrictions have been challenged as violating antitrust laws, *see United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223 (2d Cir. 2016) (*Payment Antitrust Litig.*), and have been invalidated by competition authorities in a number of countries, *see generally Public Auth. Involvement*, note 5, *supra*.

In the U.S., however, no-surcharge laws have proven to be an obstacle to resolution of these anti-trust actions. Several credit card companies have entered into settlements whereby they have agreed to refrain from enforcing their private surcharge rules, but courts have invalidated these settlements as illusory on the theory that merchants

terms of cash discounts, not credit-card surcharges, these laws purposefully mute the signals that merchants can send to customers. (Pet. Br. 14)

This is because a surcharge and a discount may be *mathematically* equivalent ways of representing the relationship between two prices, but they nevertheless have very different effects on consumer behavior. Whichever price is presented as the "base" price—from which the surcharged or discounted price deviates—creates an anchor or frame for consumer evaluation of the price relationship. Cognitive psychologists and behavioral economists have shown that these frames shape consumers' perceptions. Just as whether a person's perception can be shaped by describing a bottle as half-full or half-empty, scientists have shown that consumers react differently when a price differential is described as a surcharge than when it is described as a discount. Consumers have a strong negative reaction to a credit-card surcharge, but only a mild positive reaction to a mathematically equivalent cash discount. *See* E. Vis & J. Toth, ITM Research, *The Abolition of the No-Discrimination Rule, Report for European Commission Directorate General Competition* 11 (2000), <bit.ly/2g4QTM9>; *see also* Scott Schuh et al., *An Economic Analysis of the 2010 Proposed Settlement Between the Department of Justice and Credit Card Networks* 26-27 (Fed. Reserve Bank of Boston, Public Policy Discussion Paper No. 11-4, 2011), <bit.ly/2fGYFOc> (discussing an IKEA internal study finding that surcharging results in decreased use of credit cards). This means that the mildly positive consumer reaction associated with a

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would still be barred from charging surcharges under state law. *E.g.*, *Payment Antitrust Litig.*, 827 F.3d at 238.

discount will not incentivize consumers to choose cheaper payment methods in the same way that the strongly negative signal of a surcharge would, a cognitive bias that introduces inefficiency that artificially inflates the costs that customers are willing to accept for the good or service. In simple terms, if consumers don't know the price of a service, they are likely to over-consume the service beyond what is efficient.

There are other reasons why merchants might balk at being forced to offer cash discounts rather than surcharges. Laws permitting only cash discounts put merchants at a competitive disadvantage, because the only way for merchants to charge for the cost of credit is to raise what they advertise as their base price, and then offer the discount off that increased price. Edmund W. Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217, 225 (1990). This puts merchants who offer a cash discount at a perceived disadvantage when compared with merchants who spread their credit costs uniformly among all customers, because the latter can thereby advertise their goods at a lower base price.

Merchants may also wish to avoid incentivizing cash purchases for fear of being stigmatized. This is because in some quarters, cash transactions are used to evade taxes or hide money earned illegally from authorities. Merchants may thus fear that by openly encouraging cash payments, they might be seen by customers as unsavory or generally unscrupulous. *E.g.*, JA 107.

For these reasons, a "discount" is much less effective than a "surcharge" in explaining costs to customers and

persuading them to use cheaper payment mechanisms. Indeed, if surcharges and discounts were behaviorally equivalent—and truly synonyms in the real world—then state no-surcharge laws would not exist. The entire *raison d'être* for no-surcharge laws stems from the fact that a surcharge has a *different* communicative effect than a discount.

II. No-surcharge laws serve no legitimate state interest.

No-surcharge laws exist to protect credit-card companies' profits by disguising the costs of credit and depriving merchants of the ability to explain those costs to consumers. Respondents do not seriously dispute these motivations, but contend that that no-surcharge laws are nevertheless needed to protect consumers in spite of the speech toll they exact from merchants. Yet such laws offer consumers no protection that other, better-targeted laws could not provide without inhibiting merchants' right to communicate accurate price information to consumers. Indeed, no-surcharge laws are often harmful to poorer consumers, frequently imposing regressive cross-subsidies whereby poorer consumers are made to pay for their wealthier friends' credit-card rewards.

A. State no-surcharge laws are motivated by credit-card-industry protectionism.

The legislative origins of state no-surcharge laws reveal them for what they really are: industry-lobbied lawmaking efforts aimed at ensuring a bounty of inflated profits for credit-card companies.

Although there had once been federal legislation banning surcharges, state no-surcharge laws did not begin to

appear until 1981, when the federal surcharge ban temporarily lapsed, *Economic Costs*, note 2, *supra*, at 1381 & n.216, and even more appeared after the federal ban's permanent lapse in 1984, *ibid.*

The credit card industry was undeniably the driving force behind these legislative efforts. But the industry went to great—and greatly deceptive—lengths to make it *appear* as though the laws had consumer support. Credit-card companies financed the creation of a faux consumer group called "Consumers Against Penalty Surcharges," which was later revealed to be nothing more than a marketing ploy lacking any true backing from consumers. *See* Memo from Kate Krell 3, July 24, 1987, <bit.ly/2fLyUNB> (emphasizing the work of public-relations firm Hill & Knowlton in "put[ting] together 'Consumers Against Penalty Surcharges' for a coalition of credit card companies"). American Express, the purveyor of the most expensive payment instruments in the economy, which thus stood the most to lose from surcharging, even bragged that it had "established" Consumers Against Penalty Surcharges, and that the group was "instrumental in helping achieve state bans on surcharges in New York, California, Texas, Connecticut, Colorado, and Kansas." Meredith M. Fernstrom, Senior Vice-President—Public Responsibility, American Express Company, *The Corporation and the Consumer: Obligation or Opportunity?* Consumer Interests Ann. 353, 355 (1988), <bit.ly/2goqvQi>. *See also* Maxwell Glen & Cody Shearer, *Credit card companies discrepancies found between television ads, letters mailed*, Univ. Press (Beaumont Texas), Apr. 12, 1984, at 3, <bit.ly/2g6rKky> (noting that American Express had hired a Carter administration

official to organize Consumers Against Penalty Surcharges); AP, *House for Credit Card Fee Ban*, N.Y. Times, Apr. 4, 1984 (noting that "Besides American Express, credit surcharges are being opposed by the other major card companies, the American Bankers Association and Consumers Against Penalty Surcharges, a coalition that receives funds from American Express and Visa").

True consumer groups strongly opposed the adoption of this collection of no-surcharge laws, claiming that they "give[] consumers incorrect signals about credit—making it appear to be free when it in fact has substantial costs." 127 Cong. Rec. 4228 (Mar. 12, 1981); *see also, e.g.*, JA 65-66 (noting that "the credit card companies are trying to pass a similar prohibition [to the expired federal no-surcharge law] in the California legislature"); JA 63-64 (in opposition to California's no-surcharge law). The fact that these laws were enacted at the behest of the credit-card lobby, under a shroud of deception, and over the strong objection of actual consumers, provides reason to be skeptical about whether they were motivated out of any true desire to protect consumers.

B. These laws do not protect consumers.

When the supposedly consumer-protective motivations behind no-surcharge laws are closely examined, any actual benefit to consumers is hard to find. Respondents claim that these laws generally advance the sorts of consumer-focused goals that states faced with First Amendment challenges usually unearth. But none of these justifications stands up under scrutiny, because narrower, more targeted laws would do a better job at addressing many of the concerns Respondents claim to care about, and in many instances, no-surcharge laws actually prove

counterproductive to Respondents' asserted goals.

1. Credit card surcharges are not inherently deceptive.

Recognizing that there is nothing *necessarily* deceptive about telling customers that they must pay more for the convenience and increased cost of paying by credit card, Respondents insist that surcharges are nonetheless inherently deceptive—so as to justify a complete ban—on the theory that surcharges would inevitably lead to deceptive "bait-and-switch" tactics that might occur if merchants posted a cash price for a good or service, and then asked customers to pay a surcharge when they wished to by credit card. Respondents invoke examples culled from congressional testimony from the 1970s, when credit cards were a new invention, regarding "gas stations that lure[d] drivers from the road with one posted price only to charge more per gallon at the pump for credit-card users." Schneiderman C.A. Br. 10.

This justification for a no-surcharge law lapses into tautology, because to suggest that credit-card surcharging practices *inevitably* foster merchant deception assumes that a reasonable consumer would be justified in thinking that no merchant *would ever* impose a separate surcharge for credit, such that when the consumer saw the advertised price, she would reasonably assume she would *never* pay more than that price for the convenience of paying by credit. If any consumer currently labors under that assumption, it is entirely because no-surcharge statutes exist, and merchants therefore do not surcharge. That says nothing about whether such assumptions can reasonably persist after those bans are lifted.

The view that credit-card surcharging practices are inherently deceptive also overlooks the nature of payment systems and the comfort that customers have now achieved with them. When customers purchase goods or services on credit, they are not understood to be engaging in a single transaction. Rather, they are engaging in two transactions: one for the sale of the underlying good or service, and another for the service of arranging payment. It is not deceptive for the merchant to ask that the consumer pay for those things separately. Nor is it necessarily deceptive if that cost is not advertised alongside the price of the good itself. After all, there are many charges, such as sales taxes (which themselves vary considerably across jurisdictions) that are routinely tacked onto the advertised price, and no one suggests that advertising prices without including the associated sales taxes is deceptive.

Nor, for that matter, must a merchant bake all of its costs or services into a single advertised price to avoid deceiving consumers. Merchants might wish to provide a number of services alongside the sale of the underlying good or service, and charge separately for these services through surcharges. For example, if a merchant agreed to accept foreign currency, she might wish to impose a surcharge to cover the risk that the exchange rate might change before the foreign currency could be converted to dollars. It would be uncontroversial to suggest that a separate surcharge would be appropriate and not deceptive in such instances, and if so, it is hard to understand why it is not appropriate in the credit-card context.

That is not to say that surcharges are inherently *immune* from abuse by unscrupulous merchants; indeed, such abuse may have occurred in the gas station examples

relied upon by Respondents. But if states were truly concerned about protecting consumers from hidden surcharges, it would be better to prescribe by law that surcharges be prominently disclosed rather than prohibit them outright. This is what some states have done, *see* Minn. Stat. § 325G.051(1)(a), and what federal law requires for ATM surcharges. 12 C.F.R. § 1005.16. Indeed, misleading behavior in commerce is already generally prohibited under New York law, *see* N.Y. Gen. Bus. Law § 349; *id.* §§ 350 & 350-a, and authorities in New York have used these false-advertising laws to police bait-and-switch tactics in the context of credit cards without any need to resort to the no-surcharge law. *See* JA 144-45. In short, laws on the books already prevent the deceptive behavior Respondents are worried about, making a complete ban both unwarranted and unnecessary.

2. Surcharges are not especially likely to engender consumer confusion.

Respondents also argue that surcharges can result in consumer confusion, on the theory that even if notice is given of the surcharge, consumers might have difficulty engaging in the "multiple math problems" required to compare a discount offered by one merchant with the surcharge offered by another. Schneiderman C.A. Br. 9. But pure apples-to-apples comparisons are hard to come by in the modern shopping world. Consumers must frequently engage in imperfect comparisons, forced to evaluate distinctions not only in the quality and features of the products themselves, but also in the warranties, privacy policies, shipping costs, handling charges, processing fees, and applicable taxes that come with them. Among these myriad complexities in comparison shopping, there is no reason to single out credit-card surcharges, especially

when a customer can make meaningful comparisons between discounts and surcharges by rough approximation without engaging in any difficult or complex math.

3. Permitting surcharges will not facilitate price-gouging.

Respondents suggest a third reason to bar surcharging is to prevent price gouging and profiteering. Schneiderman C.A. Br. 10, 43. Here Respondents misattribute problems actually caused by generally uncompetitive industries and local monopolies to be caused instead by credit-card surcharges. When these anti-competitive conditions exist, businesses will exercise outsized market power, which they will no doubt tend to abuse, in surcharging or anywhere else. In such circumstances, the problem is not surcharging, or any other particular mechanism of exercising market power, but the general lack of competition that fosters concentration of undue market power in the first place.

Indeed, surcharges can be the *solution* to anti-competitiveness among merchants and credit-card companies alike. Allowing merchants to label their credit-card fees as surcharges will allow customers to compare surcharges, and to determine whose are lowest. That will force merchants to keep their surcharges low—*and* force credit-card companies to keep *their* fees low—which will in turn ensure that price-gouging is unlikely to occur.

Moreover, no-surcharge laws hardly prevent price-gouging, because under those laws as written, merchants are already free to charge whatever unjust sums they want: they need only inflate the base price rather than the surcharge. Indeed, states truly concerned about the potential for price-gouging are free to impose limits on the

surcharges that merchants may charge. Once again, such narrow laws targeting specific abuses would be preferable to a complete ban on use of the label.

It is not necessary to speculate, however, about concerns of price gouging and profiteering, because Australia's recent experience with credit-card surcharges shows such fears to be unfounded. In 2003, the Reserve Bank of Australia enacted a set of reforms of the country's credit card industry, which included allowing merchants to surcharge for credit-card swipe fees. Following the reforms, some merchants began to surcharge, and concerns arose that some merchants were abusing that freedom to profiteering ends. But after an exhaustive investigation, the New South Wales government's Office of Fair Trading and CHOICE, the leading Australian consumer advocacy group, found no actual concrete evidence that profiteering was occurring. CHOICE, *Choice Report, Credit Card Surcharging in Australia* 12 (2010), <bit.ly/1ACjSYt>.

Although some Australian merchants were found to surcharge substantially more than the *national average* swipe fees, there is no evidence that even these merchants were charging more than *their own average* swipe fee, which could vary from the national average as the result of either the types of cards the merchants accepted or the merchants' particular risk profiles. *Ibid; see also* Reserve Bank of Australia, *Review of Payment Card Regulation, Conclusions Paper* 33 (May 2016) (*Conclusions Paper*), <bit.ly/2g4Icnz>. Thus, the Reserve Bank of Australia's own study determined that excessive surcharging might have been occurring in "a small number of cases," *see* Reserve Bank of Australia, *Review of Payment Card Regulation, Consultation Paper* 8 (Dec. 2015), <bit.ly/2g3y8Yr>, but even in these isolated instances,

none was deemed to be true profiteering.

Perhaps more importantly, the study found that these isolated instances of excessive surcharging were confined to only a "few industries," *ibid.*, particularly the airline and taxi industries, perhaps as the result of anti-competitive forces particular to these areas of the economy, and Australian governmental authorities responded appropriately by attacking the perceived problem narrowly. The Australian federal government passed legislation this year permitting the Reserve Bank of Australia to issue regulations to limit excessive surcharging.[7] *See* Competition and Consumer Amendment (Payment Surcharges) Act 2016 (Feb. 25, 2016). Rather than impose a complete surcharge ban, the Reserve Bank of Australia has instead implemented regulations restricting surcharges to the average cost of cards of a particular brand. Reserve Bank of Australia, Payment Systems (Regulation) Act 1998, Standard No. 3 of 2016: *Scheme Rules Relating to Merchant Pricing for Credit, Debit, and Prepaid Card Transactions* (2016), <bit.ly/2aBkBJM>; *Conclusions Paper* 66.

The Australian experience reveals not only the absence of widespread merchant profiteering through surcharging (or indeed, conclusive evidence of *any* merchant profiteering), but also that such concerns can be addressed through narrowly tailored laws limiting surcharging to actual costs imposed by particular payment methods. A general ban on surcharging thus limits speech far

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[7] Five Australian states have separately capped surcharging by taxis. *Conclusions Paper* 37.

more than is necessary to advance New York's interest in protecting consumers from unfair profiteering.

4. The potential that surcharges will provoke consumer responses is a virtue, not a vice.

By far the worst of Respondents' justifications for no-surcharging laws is their concern that consumers might become upset when they learn how much merchants charge for credit-card processing services, or when they learn how much credit-card companies are charging for *their* services. Schneiderman C.A. Br. 43. Consumers may well find this price information upsetting. But that is hardly a vice—on the contrary, it is precisely the point.

If consumers feel that a merchant is penalizing their use of a credit card, they may be more likely to find a different, cheaper card, use another, cheaper, payment method, or even take their business to a merchant that does not surcharge. Indeed, the potential that surcharges might shape customer behavior towards merchants is a powerful and important check on merchants' ability to surcharge that will prevent abuse. Merchants that impose surcharges risk alienating their own clientele, which means that they will only surcharge when the surcharge is worthwhile, which only occurs when swipe fees are excessively high. U.S. swipe fees are the highest in the developed world. *Reforming Card Swipe Fees* 1. The ability to surcharge would bring market pressure to bear on these excessive swipe fees, and would result in their decline until an equilibrium point is reached at which merchants find it no longer worthwhile to surcharge. *See Economic Costs*, note 2, *supra*, at 1355. In this way, the invisible forces of the market would foster price-reducing competition among merchants and credit-card companies alike.

This is not speculative economic theory—it is precisely what occurred in Australia following its reforms in 2003. The Reserve Bank of Australia now permits merchants to surcharge. Some do, but far from all, because the incentive to do so has been reduced by the fact that swipe fees in Australia fell dramatically following the reforms. Fees for MasterCard and Visa credit cards fell by 46%—and those for American Express fell by 33%. *See* Reserve Bank of Australia, *Average Merchant Fees for Debit, Credit and Charge Cards, Statistical Table C3, Series CMFCBMVT and CMFCAET* (Nov. 2016), <bit.ly/2f8RpXt> (percentages calculated as 1 minus the quotient of September 2016 fees over March 2003 fees). Accordingly, surcharges could prove a boon, rather than a burden, for consumers, because lower costs for merchants could translate into lower prices or better services for consumers.

C. No-surcharge laws impose regressive cross-subsidies benefitting wealthier consumers and credit card companies.

Not only do no-surcharge laws hinder the efficiency-producing potential for the market to hold merchants and credit-card companies in check, they frequently cause actual *harm* to consumers. This is because such laws incentivize a regressive cross-subsidy of money and purchasing power from the users of low-cost payment instruments (cash, check, and PIN-debit) to the users of high-cost payment instruments (credit and signature-debit). In this way, laws ostensibly written to protect consumers are actually made to benefit the affluent at the expense of the poorest in society.

Because no-surcharge laws prevent merchants from

charging extra for the most expensive payment instruments, and because discounting is a poor substitute "synonym," no-surcharge laws incentivize merchants to provide only unitary or "homogenized" pricing, whereby all consumers pay the same price for goods and services irrespective of their payment method. Virtually all merchants have responded to this incentive and adopted homogenized pricing: multi-tiered pricing is very much a rarity. *See Economic Costs*, note 2, *supra*, at 1350. Indeed, the FTC has observed that when certain merchants were informed that they were charging illegal surcharges, they uniformly stopped surcharging, but none instituted cash discounts. *Cash Discount Act, 1981: Hearings Before the Subcommittee on Consumer Affairs of the S. Banking, Housing, and Urban Affairs Comm. on S. 414*, 97th Cong. 9, 126 (Feb. 18, 1981). Accordingly, even those merchants who expressed a clear preference for surcharging found that discounts were not worth pursuing as an alternative.

Homogenized pricing forces merchants to distribute the increased marginal costs that *some* customers impose through their use of credit onto *all* of the merchant's customers. This forces some customers to pay the costs of credit without actually receiving the benefits associated with using credit. *Social Costs*, note 2, *supra*, at 32-35. Consumers using cheaper payment methods are therefore subsidizing those using more expensive payment methods. The particular dynamics of this cross-subsidy will vary among merchants, as the result of differences in each merchant's pricing and payment mix, but those cross-subsidies always exist.

The amount of this subsidy is substantial, and varies greatly with the kind of card used. For example, Visa's interchange fee schedule (dated April 16, 2015) has up to

four tiers of pricing for certain merchant categories, based on the rewards program of the customer's card. Thus, if a consumer were to use a Visa Signature Preferred card at a restaurant, the interchange fee would be 2.4% of the transaction amount plus $0.10. If the consumer used a Visa Signature card, the fee would be 2.3% of the transaction amount plus $0.10. For the Visa Traditional Rewards card, the fee would be 1.95% of the transaction amount plus $0.10. And if the consumer used a non-rewards card, the fee would be 1.54% of the transaction amount plus $0.10. *See VISA USA Interchange Reimbursement Fees* 8 (Apr. 18, 2015), <vi.sa/2fpv1Km>. With a Visa business card, the fee could be as high as 2.95% of the transaction amount plus $0.20. *Id.* at 15. Accordingly, the fees on a $30 restaurant meal could vary between $0.562 to $1.085, depending on the type of Visa credit card used. And if the same meal were purchased with a Visa debit card, the fee could be as little as 0.05% of the transaction amount plus $0.21, or $0.225. Accordingly, the costs among Visa's own cards might vary by 389 percent, illustrating how great the subsidy can be, and how much it can vary with the lavishness of the perks associated with particular cards.

This cross-subsidy is also inherently regressive, because the most expensive payment methods are used primarily by very affluent individuals. *Social Costs*, note 2, *supra*, at 35-36. In contrast, the cheaper payment methods—debit card and cash—tend to be used by less affluent individuals. *Ibid.*

In its most dramatic form, this cross-subsidy means that consumers using food stamps or receiving welfare payments may find themselves subsidizing first-class upgrades and spa vacations for affluent rewards card users. States administer three key federal welfare programs: the

Supplemental Nutrition Assistance Program ("SNAP" or "food stamps"), Temporary Assistance for Needy Families ("TANF") and the Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC"). All states are required to disburse SNAP benefits to consumers only through special debit cards known as electronic benefit transfer cards ("EBT cards"). *See* 7 U.S.C. § 2016. Additionally, many states also issue TANF and WIC benefits for through EBT cards. *See Nat'l Conf. of State Legis., Restrictions on Use of Public Assistance Electronic Benefit Transfer (EBT) Cards* (2015), <bit.ly/2goEFRI>.

State EBT card programs are administered by private banks. These banks are prohibited by federal law from charging per-transaction fees to merchants for EBT card payments. 7 U.S.C. § 2016(h)(13). Although merchants have fixed costs for accepting EBT transactions in general, there is no per-transaction cost. Thus, one of the largest payment cost differentials is between EBT payments and credit payments. As many stores, particularly grocery stores, are frequented by both EBT consumers and rewards-card users, there is a high likelihood that such a regressive cross-subsidy regularly occurs in these stores. This is not only inherently unfair to poorer individuals, who must be forced to subsidize their neighbors' lavish vacations, but it also undermines the food-stamp program and other federal welfare programs by diminishing the purchasing power of food stamps and welfare through price inflation.

The regressive cross-subsidy also creates problems for a subset of the *subsidized* credit card users. The cross-subsidy encourages inefficient usage of credit cards. Unconstrained by price signals at the till, consumers tend to

overuse credit as a payment method. *See* Oren Bar-Gill, *Seduction by Plastic*, 98 Nw. U. L. Rev. 1373, 1396-402 (2004); Paul Heidhues & Botond Köszegi, *Exploiting Naivete about Self-Control in the Credit Market*, 100 Am. Econ. Rev. 2279, 2303 (2010). In addition, consumers tend to spend more when shopping on credit. *See* Drazen Prelec & Duncan Simester, *Always Leave Home Without It: A Further Investigation of the Credit-Card Effect on Willingness to Pay*, 12 Marketing Letters 5, 11 (2001). Many consumers, however, systematically underestimate their ability to repay their credit-card debt. Bar-Gil 1400-01. As consumers use credit cards for more (and larger) transactions, there is a higher likelihood that some will end up paying unanticipated credit card fees and interest, such as for accidental late payments or because unexpected life events (death, disability, divorce, or dismissal) interfere with their ability to repay card balances in full and on time. *See Social Costs*, note 2, *supra*, at 43-51. Fees and interest might offset the entire cross-subsidy benefit for some card users, and some card users are also likely to find themselves with unmanageable debt loads. Increased credit usage also appears to contribute to consumer bankruptcy filings, low savings rates, decreased purchasing power, and inflation. *Ibid.;* Teresa A. Sullivan et al., *the Fragile Middle Class: Americans In Debt* 108-40 (2000); Robert D. Manning, *Credit Card Nation: the Consequences of America's Addiction to Credit* 127, 127-32, 291-99 (2000).

Finally, it is important to note that while there is a regressive cross-subsidy created by the homogenized pricing that state no-surcharge laws encourage, the subsidy does not go solely, or even predominantly, to rewards card users. Instead, it goes to credit-card companies. Rewards cards have higher costs than non-rewards cards, but only

a fraction of that increased cost is rebated to the cardholders in the form of rewards. According to one study, rewards program benefits and administration combine to only 45% of interchange fees. Amy Dawson & Carl Hugener, Diamond Mgmt. & Tech, Consultants, *A New Business Model for Card Payments* 9 (2006) <bit.ly/2fE8jRq>. Accordingly, this it is not simply a matter of food stamp users subsidizing rewards card users, but of food stamp users subsidizing credit-card-issuing banks.

In sum, the limits no-surcharge laws place on merchants' ability to communicate with their customers are not merely hypothetical or hyper-technical. No-surcharge laws meaningfully restrict the sharing of information that could otherwise benefit both merchants and consumers. That results in real harms to real people, which cannot outweigh any marginal benefits that might be obtained from them, especially when those benefits flow largely to credit-card companies.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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ATTORNEY GENERAL OF NEW YORK, ET AL.,

Respondents.

On Writ of Certiorari to United States Court of Appeals for the Second Circuit

BRIEF OF NATIONAL GOVERNORS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, US CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Barnes v. *Glen Theatre, Inc.*,
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Brown v. *Entertainment Merchants Association*,
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Brown v. *Louisiana*,
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Carey v. *Brown*,
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Cent. Hudson Gas & Elec. Corp. v. *Pub. Serv. Comm'n of N.Y.*,
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City of Cleburne v. *Cleburne Living Ctr.*,
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City of Dallas v. *Stanglin*,
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Lochner v. *New York*,
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Munn v. *Illinois*,
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Myers v. *United States*,
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TABLE OF AUTHORITIES—continued

Page(s)

NAACP v. *Claiborne Hardware Co.*,
458 U.S. 886 (1982) 8

Nebbia v. *New York*,
291 U.S. 502 (1934) 6

Nevada Comm'n on Ethics v. *Carrigan*,
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Nordlinger v. *Hahn*,
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Ohralik v. *Ohio State Bar Ass'n*,
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Reed v. *Town of Gilbert*,
135 S. Ct. 2218 (2015) ..... *passim*

Rumsfeld v. *Forum for Acad. & Institutional Rights, Inc.*,
547 U.S. 47 (2006) 7, 8, 9

Sorrell v. *IMS Health Inc.*,
564 U.S. 552 (2011) ..... *passim*

Spence v. *Washington*,
418 U.S. 405 (1974) 7

Texas v. *Johnson*,
491 U.S. 397 (1989) 7

Tinker v. *Des Moines Independent Community Sch. Dist.*,
393 U.S. 503 (1969) 7

United States v. *O'Brien*,
391 U.S. 367 (1968) 8, 23, 27, 2

TABLE OF AUTHORITIES—continued

Page(s)

Constitution

U.S. Const.
art. I, § 8, cl. 1 11
art. I, § 10, cl. 2 11

Statutes and Rules

6 Geo. 111. Orig. Acts, vol. 5, p. 83 5

15 U.S.C.
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21 U.S.C. § 301 22

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Pub. L. No. 111-31, 123 Stat. 1776 22

204 Mass. Code Regs. 4.03(1)(c) 23

Cal. Health & Safety Code § 118950 22

Md. Code Ann., Crim. Law
§ 10-107(b)(2) 22

N.H. Province Laws 387 (1766) 6

N.Y. Gen. Bus. Law § 518 ..... *passim*

3 R.I. Gen. Laws Ann. § 3-7-26(a)(1)-(3) 23

Tex. Health & Safety Code § 161.087(a) 22

Recorded Acts, vol. 3, p. 11 6

Other Authorities

121 Cong. Rec. 36927 (1975) 14, 17

Black's Law Dictionary (10th ed. 2014) 11

TABLE OF AUTHORITIES—continued

Page(s)

Wilko Bolt, Nicole Jonker & Corry van Renselaar, *Incentives at the Counter: An Empirical Analysis of Surcharging Card Payments and Payment Behaviour in the Netherlands*, 34 J. Banking & Fin. 1738 (2010) 17, 26

Hélène Bourguignon, Renato Gomes & Jean Tirole, *Card Surcharges and Cash Discounts: Simple Economics and Regulatory Lessons*, 10(2) Competition Pol'y Int'l 13 (2014)..... 18, 26, 27

Raj Chetty et al., *Salience and Taxation: Theory and Evidence*, 99 Am. Econ. Rev. 1145 (2009)..... 26

Consumer Compliance Handbook for the Truth in Lending Act's Regulation Z, at https://perma.cc/SQ27-QTAQ..... 24

Breck P. McAllister, *Price Control by Law in the United States: A Survey*, 4 Law & Contemp. Probs 273 (1937)..... 5

Michael Morrison et al., *In-store Music and Aroma Influences on Shopper Behavior and Satisfaction*, 64 J. Bus. Res. 558 (2011)..... 10

Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165 (2015)..... 21

TABLE OF AUTHORITIES—continued

Page(s)

Marc Rysman & Julian Wright, *The Economics of Payment Cards*, 13 Rev. Network Econ. 303 (2014) 18

Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 Wm & Mary L. Rev. 1613 (2015) 20

Amanda Shanor, *The New Lochner*, 2016 Wisc. L. Rev. 133 (2016) 21

Mark Stiving & Russell S. Winer, *An Empirical Analysis of Price Endings With Scanner Data*, 24 J. Consumer Res. 57 (1997) 27

Manoj Thomas & Vicki Morwitz, *Penny Wise and Pound Foolish: The Left-Digit Effect in Price Cognition*, 32 J. Consumer Res. 54 (2005) 27

Todd J. Zywicki et al., Behavioral Law and Economics Goes to Court: The Fundamental Flaws in the Behavioral Law & Economics Arguments Against No-Surcharge Laws (Intl. Cent. Law & Econ. Fin. Reg. Research Prog. Paper, 2016), *available at* https://perma.cc/45ZA-VSWW 26

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INTEREST OF *AMICI CURIAE*[1]

Amici are not-for-profit organizations whose missions are to advance the interests of cities, counties, and other local governments. They file this brief to address the proper constitutional treatment of price regulations of the sort at issue in this case, a matter of considerable practical importance both to governments at all levels and to the individuals who are served by those governments. *Amici* include:

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 states, three territories, and two commonwealths.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans and 49 state municipal leagues.

The US Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance through advocacy and by developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a First Amendment challenge to the constitutionality of N.Y. Gen. Bus. Law § 518, which bars retailers from imposing surcharges when customers make purchases with a credit card. Although Section 518 by its plain terms addresses only conduct—and although petitioners concede that the statute "'on its face appear[s] neutral'" (Pet. Br. 27)—petitioners nevertheless submit that the surcharge prohibition actually restricts speech and therefore is subject to heightened scrutiny. But in this case, at least, appearances are not deceiving: the surcharge prohibition is directed at, and affects, the setting of prices, not speech or expressive conduct. As a straightforward economic regulation, the law therefore is subject to, and easily survives, rational basis review.

A. Since pre-Revolutionary times, it has been understood that governments at all levels may regulate prices. Such laws have always been thought to regulate conduct, and therefore not to be subject to First Amendment scrutiny. To be sure, an act (like charging a price) may have an expressive component that makes it equivalent to speech. But that is so only if (1) the actor intends to convey a message and (2) the likelihood is great that the message will be understood without additional explanatory speech. Absent these considerations, the simple fact that actions affect the behavior of the people exposed to them does not convert that conduct into speech.

Here, the text, operation, and background of Section 518 all indicate that it is a regulation of conduct, not a restriction of speech. On the face of it, the statute does nothing more than bar the imposition of credit-card surcharges, limiting a retailer's ability to engage in what unquestionably is a non-expressive act. Such a rule—which precludes the imposition of certain charges to a product's "sticker" price—is not purely semantic in effect; it has a real-world impact on the amount that may permissibly be charged once the sticker price is set. Beyond that, Section 518 has no effect on speech, imposing no limits on the statements that merchants may make about any subject, including the desirability of credit-card surcharges. The legislative background confirms that the regulation was intended to restrict retailer conduct by discouraging price gouging and excessive credit-card markups, not to suppress speech. Reading such a law as a restriction on speech finds no support in this Court's decisions and would make many forms of familiar economic regulation impossible.

B. If Section 518 nevertheless were thought to impose an incidental restriction on expression, it would survive the attendant limited First Amendment review. The surcharge prohibition advances substantial government interests, protecting consumers from misleading pricing and excessive credit-card charges. Any impact the law has on expression is incidental to its permissible regulation of conduct. And Section 518 goes no further than necessary to advance the State's legitimate aims.

ARGUMENT

A. Price Regulations Like The New York Surcharge Prohibition Address Conduct Rather Than Speech.

The First Amendment bars government from abridging the freedom of "speech." It therefore goes almost without saying that "the Amendment has no application when what is restricted is not protected speech." *Nevada Comm'n on Ethics* v. *Carrigan*, 564 U.S. 117, 121 (2011). In particular, "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 567 (2011). As a consequence, it is essential to distinguish between speech and conduct—which the Court has done by considering both the past treatment of the regulated subject and whether the regulated activity communicates a particularized message that is comprehensible to the intended audience, absent further speech. Both of these considerations demonstrate that the activity regulated by Section 518 is conduct. New York's law therefore is not subject to First Amendment scrutiny at all.

1. A consistent understanding that the First Amendment does not apply to particular forms of conduct provides strong evidence that the conduct does not qualify as constitutionally protected speech.

First, and most simply, history and this Court's jurisprudence regard certain types of government regulation as falling outside the scope of the First Amendment. As the Court has explained, "[a] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional: Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness." *Carrigan*, 564 U.S. at 122 (citations and internal quotation marks omitted).

That understanding should be dispositive here. Economic regulations, and price regulations like New York's surcharge prohibition in particular, have long been regarded in just that way, as permissible regulations of conduct rather than as restrictions of speech or expressive activity. In fact, as both New York (at 23-24) and the United States (at 16-17) demonstrate in their briefs, governments at all levels in this country have a tradition of price regulation that predates the founding generation.

During the revolutionary years, nearly "every article in general use, as well as the wages of labor, were fixed by most of the state legislatures." Breck P. McAllister, *Price Control by Law in the United States: A Survey*, 4 Law & Contemp. Probs 273, 274 (1937) (describing adoption of colonial pricing schedules and prohibitions against the price-gouging practices of engrossing and forestalling); see *e.g.*, An Act to Regulate the Price & Assize of Bread, 6 Geo. 111.

Orig. Acts, vol. 5, p. 83; Recorded Acts, vol. 3, p. 11; N.H. Province Laws 387 (enacted Jan. 16, 1766). This history is of obvious relevance here: "[A] contemporaneous legislative exposition of the Constitution, when the founders of our government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions." *Myers* v. *United States*, 272 U.S. 52, 175 (1926). Accordingly, if price regulation is to be judged by the "practices and beliefs of the founding generation" (*Brown* v. *Entertainment Merchants Association*, 564 U.S. 786, 821 (2011) (Thomas, J., dissenting)), its exclusion from First Amendment coverage is appropriate.

And price regulation, by both the federal and the state governments, has continued without interruption to the present day. As the Court explained more than a century ago, "it has been customary in England from time immemorial, and in this country from its first colonization, to * * * fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold." *Munn* v. *Illinois*, 94 U.S. (4 Otto) 113, 125 (1876). See generally *Nebbia* v. *New York*, 291 U.S. 502, 532 (1934) (there is nothing "peculiarly sacrosanct about the price one may charge for what he makes or sells"). As a general matter, then, "[d]irectly banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways)" "involve[es] no restriction on speech regarding lawful activity at all." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 524 (1996) (Thomas, J., concurring in part and concurring in the judgment). The Court has never suggested otherwise—and it appears that petitioners do not dispute the point. See Pet. Br. 43.

2. Conduct triggers First Amendment scrutiny only if its message is comprehensible.

a. Of course, some conduct does have, or may take on, expressive components that subject it to First Amendment scrutiny. But that is so only if the activity is "inherently expressive" and succeeds in making a deliberate statement. *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006). Fundamentally, conduct will be regarded as expressive—and therefore as constitutionally equivalent to speech—only if it conveys an intelligible message without regard to any accompanying speech.

Conduct is treated as though it is speech when it satisfies two conditions associated with conveying a message that is comprehensible to the viewer or listener: (1) when there is an "intent to convey a particularized message" *and* (2) the "likelihood [is] great that the message would be understood by those who viewed it." *Texas* v. *Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence* v. *Washington*, 418 U.S. 405, 410-411 (1974)). For example, flag burning at protests is both intended and widely understood to signal displeasure with the federal government, and therefore to be expressive conduct subject to First Amendment scrutiny. *Ibid.* The display of yellow ribbons is generally understood to communicate support for U.S. troops today, just as black armbands were once worn to register opposition to the Vietnam War.[2] These acts implicate the First Amendment's

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[2] See *Tinker* v. *Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 505-506 (1969). Pickets, boycotts, sit-ins, walkouts, and marches all involve conduct, but when done with the purpose of stating a message or affecting public opinion are entitled to protection as a means of expression. See, *e.g.*, *Carey* v. *Brown*, 447 U.S. 455, 460 (1980) (reaffirming that prohibitions

values because they make intelligible contributions to the national conversation, whether or not one agrees with the statements made.

It is equally fundamental, however, that not *all* conduct qualifies as expressive. The Court has repeatedly rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968); see also, *e.g.*, *City of Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."). The setting of a price, the styling of hair, and the preparation of food all may all involve some level of expression that would be constrained by state regulation and licensing. But because they advance no discrete and comprehensible statement, these acts are not inherently expressive activities. No one would seriously suggest, for example, that the requirement to obtain a barber's license implicates the First Amendment.

One clear guide to where to draw this line between speech and conduct was suggested in *Rumsfeld*: expressive conduct must be capable of

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against "peaceful picketing" regulate expressive conduct); *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (finding conduct pertaining to a boycott of white merchants to be expressive); *Brown* v. *Louisiana*, 383 U.S. 131, 141-142 (1966) (acknowledging the "right in a peaceable and orderly manner to protest by silent and reproachful presence" through a sit-in at a segregated library).

communicating its message on its own terms, and "[t]he fact that * * * explanatory speech is necessary is strong evidence that * * * conduct * * * is not so inherently expressive that it warrants protection." *Rumsfeld*, 547 U.S. at 66. By the same token, the Court has been sensitive to context when recognizing conduct to fall within the First Amendment's scope. In deciding that nude dancing at adult theaters qualifies as "expressive conduct within the outer perimeters of the First Amendment," albeit "only marginally so," the Court thus accepted that the performers were conveying an erotic message that could be understood by their audience without any further elaboration. *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 571 (1991). But such nudity at a beach "would convey little if any erotic message"—even if the same message were intended—without additional speech or context, and thus would not bring the First Amendment into play.

b. Considering this basic element of mutual comprehension on the part of speaker and listener as central to the existence of constitutionally protected expressive conduct, direct pricing regulations like Section 518 do not fall within even the "outer perimeters" of the First Amendment. The only particularized message a price inherently expresses is the price itself. If a retailer intends to communicate more than the dollars and cents owed by, for example, failing to attach a surcharge to the sticker price, the likelihood is exceedingly low that the message would be received. A merchant would need to discuss his or her reasons for making upward price adjustments as opposed to downward ones for the intended statement to be understood. The retail setting also fails to provide sufficient context to elevate pricing into expressive conduct. Whether a price is posted in a store, on

a restaurant menu, or at a box office, a price is universally understood to signify the cost of a product or service, and nothing more.

Of course, certain pricing structures may involve some level of "mental intermediation" and may influence consumer behavior in ways that ultimately align with a merchant's particular views. See Pet. Br. 31 (quoting *Am. Booksellers Ass'n, Inc.* v. *Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986)). But the simple fact that an action has an effect on thought processes and behavior does not, in and of itself, make the act expressive. To offer just one example, in the commercial context the scent of vanilla might put shoppers in mind of snacks, elevate their mood, or manipulate them into visiting the store café. The store's management might even have intended this response. See Michael Morrison et al., *In-store Music and Aroma Influences on Shopper Behavior and Satisfaction*, 64 J. Bus. Res. 558 (2011). That effect, however, would not convert the release of vanilla scent into speech—or convert a state law that bars department stores from scenting their elevators with vanilla into a suppression of speech that is subject to First Amendment scrutiny.

B. New York's Pricing Regulation Targets Economic Conduct And Is Outside The First Amendment's Scope.

Against this background, both the text and the operation of Section 518 confirm that the New York surcharge ban is not a restriction of protected speech; it is, instead, a conventional economic regulation. The history of the New York legislation, as well as congressional statements regarding that statute's antecedent federal law, also support that

conclusion. As a law targeted at economic conduct and not speech, the New York surcharge ban is thus appropriately subject to rational basis review. Section 518 easily survives this level of scrutiny.

1. By its plain terms, New York's surcharge prohibition is a regulation of economic conduct.

The text of Section 518 contains a single directive: "No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. On the face of it, the sentence is directed to the regulation of economic conduct; the word "impose" means "to levy or exact" as in "a tax or duty." Black's Law Dictionary (10th ed. 2014). The term has historically been understood to have regulatory connotations. Variations of it, used in a regulatory sense, are sprinkled through the Constitution: The Eighth Amendment uses the word "impose" in relation to "fines," and the cognate "imposts" appears four separate times alongside the words "taxes," "duties," and "excises." U.S. Const. art. I, §8, cl. 1; *id.* art. I, §10, cl. 2.

Beyond that, the surcharge prohibition does not "silenc[e] merchants' attempts to call consumers' attention to the true costs of credit" (Pet. Br. 8), or "muzzl[e]" those who would like to "tell their side of the story" about credit card swipe fees. *Id.* at 33. It is not concerned with censorship. See *id.* at 3. Section 518 does not bar merchants from talking about credit card swipe fees, or from expressing their support for or opposition to them. It does not prevent retailers from "put[ting] up signs asking customers to 'STOP UNFAIR CREDIT CARD FEES,'" or lobbying the New York Assembly to amend the statute. See Pet.

Br. 20 (describing 7-Eleven's campaign against swipe fees and its 1.6-million-person petition effort).

Section 518, moreover, does not require or forbid expressive conduct. Some retailers might like to adopt a surcharge because they share petitioners' views, but others might do so because they think a surcharge would be easy to apply or believe freedom to impose a surcharge would help their bottom lines. For these reasons, a customer faced with a surcharge would have no idea what statement, if any, is being made by the merchant. It follows that a surcharge in itself would not be inherently expressive.

In all, then, Section 518 does not "suppress information in order to manipulate the choices of consumers" or "keep[] would-be recipients of * * * speech in the dark." *44 Liquormart*, 517 U.S. at 521, 523 (Thomas, J., concurring in part and concurring in the judgment). It "neither forbids nor requires anyone to say anything, to engage in any form of symbolic speech, or to endorse any particular point of view, whether ideological or related to the sale of a product." *Sorrell*, 564 U.S. at 585-586 (Breyer, J., dissenting). It is, instead, an ordinary economic regulation that is within the State's authority to administer. Accordingly, Section 518 is just the kind of direct economic regulation that the Court has long described as unaffected by the First Amendment. Cf. *44 Liquormart*, 517 U.S. at 507 (plurality opinion) (suggesting that alcohol consumption may be deterred through "higher prices * * * maintained either by direct regulation or by increased taxation"); see also *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 581 (1980) (favoring "direct regulation" of commercial activity over "suppression of speech").

In response to this common-sense observation that Section 518 addresses prices that may be charged, petitioners and the United States contend that, because the statute does not preclude a merchant from setting its price at any given level, it "addresses the *communication* of an otherwise-permissible pricing scheme, rather than the pricing scheme *itself*." U.S. Br. 19; see Pet. Br. 27-28. Their theory appears to be that Section 518 limits the terms used to characterize the pricing scheme rather than the substance of the scheme's operation. But that simply is not so. The surcharge prohibition regulates the relationship between the standard price—that is, the sticker price in common retail settings, understood to be the most widely posted and visible price that consumers expect they will pay when a product is rung up at the register—and the final price at sale. The sticker price may be reduced, but it may not be increased by addition of a credit-card surcharge. This law, as written, has real economic consequences that have nothing to do with semantics. Section 518 regulates the marketplace, not the marketplace of ideas.

2. The history of the New York surcharge prohibition and the predecessor federal ban demonstrates a concern with regulating economic conduct.

This understanding of the meaning of Section 518—as a regulation of economic conduct—is confirmed by examination of the purpose underlying the lapsed credit-card surcharge ban under the federal Truth in Lending Act: to protect consumers against price gouging. The federal ban, adopted in 1976, Pub. L. No. 94-222, 90 Stat. 197 (1976), expired eight years later. To keep the surcharge ban alive, the

New York Assembly enacted the price regulation contained in Section 518 using virtually identical language. Compare N.Y. Gen. Bus. Law § 518 ("No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.") with 15 U.S.C. §1666(f) (1976) ("No seller in any sales transaction may impose a surcharge on a cardholder who elects to use credit card in lieu of payment by cash, check, or similar means."). The federal law thus provides substantial guidance on the meaning of the New York legislation.

There is little doubt that the federal statute was intended to, and did, function as a regulation of economic conduct. The U.S. House of Representatives adopted the surcharge ban so that "no consumer should ever have to pay more than the regular price of goods and services," on the understanding that "surcharging credit card users would place a terribly unfair burden on already hard-pressed consumers." 121 Cong. Rec. 36927 (1975) (emphasis added). Overall, the federal law was meant to benefit consumers in multiple ways: "By encouraging sellers to offer cash discounts, [and] by prohibiting sellers from surcharging credit card use." *Ibid.* (emphasis added); see also U.S. Br. 3-9.[3]

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[3] See, *e.g.*, The Fair Credit Billing Act Amendments of 1975: Hearing Before the H. Subcomm. on Consumer Affairs of the Comm. on Banking, Housing, and Urban Affairs, 94th Cong. 6 (1975) ("[G]uaranteed payment and increased business is more than worth the merchant's costs for affiliation, * * * a surcharge to the consumer would be an unfair shift of the responsibility for these benefits."); 121 Cong. Rec. 36927 (1975) ("[T]he whole thrust of this legislation is to encourage retailers to offer price differentials by giving price reductions to those who pay by

There is no indication that New York wished to depart from this regulatory purpose. To the contrary, there is every reason to believe that the New York legislature intended the state law to be co-extensive with the federal ban. The clearest indication of this, of course, is the legislature's choice of virtually identical statutory text. And although there is little explanatory history accompanying the New York legislation—seemingly because New York legislators understood the state law to be a straightforward reenactment of the federal rule—what there is confirms New York's regulatory intent.

Thus, making reference to the expired federal ban, one of the co-sponsors of the New York bill declared that "[t]he consumers of New York State must not be required to forego this essential protection in the market place because Congress cannot * * * resolve the somewhat technical points." J.A. 84. Surcharges, the New York legislature feared, would subject consumers to "dubious marketing practices and variable purchase prices." *Id.* at 83. The State Consumer Protection Board wholeheartedly endorsed the measure, while supporting the availability of cash discounts; "[s]urcharges, even if only psychologically, impose penalties on purchasers and may actually

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cash. * * * [D]iscounts to cash customers are an equitable way to benefit cash-paying users, and it gives retailers, small and large, more pricing freedom than they have now."); The Cash Discount Act & The National Consumer Usury Commission: Hearing Before the H. Subcomm. on Consumer Affairs of the Comm. on Banking, Housing, and Urban Affairs, 96th Cong. 3 (1980) ("This form of price gouging is outrageous * * * because with certain purchases such as gosoline [sic], a consumer [who] has an absolute need to make the purchase * * * [but is] unable to pay by cash * * * would have no alternative but to pay the surcharge penalty.").

dampen retail sales. A cash discount, on the other hand, operates as an incentive and encourages desired behavior." J.A. 89. The Board stressed the importance of permitting consumers to rely on advertised prices and argued that "[a]llowing credit card surcharges may defeat this effort * * * by permitting unannounced price increases at the point of sale." *Ibid.* No mention was made of merchants' speech in the description of the rationale for this dual-pricing scheme.

Petitioners' reliance on New York's enforcement history to suggest that the law governs speech rather than conduct (Pet. Br. 28-30) is wrong for related reasons. In 2008 and 2009, the New York Attorney General's Office conducted enforcement sweeps targeting merchants who listed a regular price and then noted a surcharge on top of that. J.A. 98-100, 105-109, 123-145. For example, one fuel retailer said his process was to "tell [customers] the price of fuel (for example, $3.45/gallon) and then explain that there was a surcharge on top of that price for paying with a credit card (for example, $.05/gallon)." This retailer was not targeted because he used the wrong words, but because, by his own admission, he was imposing a surcharge over the regular price. Under Section 518, retailers may not tack extra fees onto that price. If a retailer says there is a surcharge, this means that the merchant is either misstating the sticker price and therefore engaging in "false, deceptive, and misleading commercial speech" (*Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 576), or speaking truthfully but engaging in the conduct that Section 518 bans by imposing a surcharge in fact.

3. Direct economic regulations like the surcharge prohibition receive rational basis scrutiny.

Because Section 518 does not infringe freedom of speech under the First Amendment, it is subject only to rational basis review under the Due Process Clause. See, *e.g.*, *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992). The statute easily survives this review.

New York is not relying on a measure whose "relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Instead, New York has offered a set of reasonable motivations for its surcharge ban. In particular, the State sought to avoid "dubious marketing practices and variable purchase prices" (J.A. 83) "by permitting unannounced price increases at the point of sale." J.A. 89. Surcharges, "even if only psychologically, impose penalties on purchasers." *Ibid.* These rationales match those offered in favor of the federal ban. See, *e.g.*, 121 Cong. Rec. 36927 (1975) ("[S]urcharging credit card users would place a terribly unfair burden on already hard-pressed consumers."). The United States recognizes these as the goals of the 1976 federal surcharge ban. See U.S. Br. 4-5.

Indeed, empirical studies have shown that Congress and the New York Assembly had substantial bases for enacting surcharge legislation. Credit card surcharges have high social costs. In the Netherlands, for example, surcharges are allowed only on debit cards. One study by economists at the Bank of Netherlands concluded that instituting a surcharge ban could lead to significant savings. Wilko Bolt, Nicole Jonker & Corry van Renselaar, *Incentives at the*

Counter: An Empirical Analysis of Surcharging Card Payments and Payment Behaviour in the Netherlands, 34 J. Banking & Fin. 1738 (2010); see also Hélène Bourguignon, Renato Gomes & Jean Tirole, *Card Surcharges and Cash Discounts: Simple Economics and Regulatory Lessons*, 10(2) Competition Pol'y Int'l 13, 16-17 (2014) (addressing U.K. surcharge ban). In Australia, the lifting of a surcharge ban on all credit-card purchases resulted in merchants imposing increasingly higher surcharges—up to twice the amount of fees actually charged by credit card companies. Marc Rysman & Julian Wright, *The Economics of Payment Cards*, 13 Rev. Network Econ. 303, 303-353 (2014). The New York State Consumer Protection Board cited this same concern in support of the state ban. J.A. 89. The lived experience with surcharge bans thus confirms the significant social benefits rationally envisioned by the New York Assembly.

C. Expanding The Definition Of Speech To Cover The Economic Conduct Regulated By Section 518 Would Jeopardize Vital State And Federal Interests.

Accordingly, classifying pricing as speech—and the surcharge prohibition as a law regulating speech—would depart radically from this Court's precedent and hobble the ability of States and the federal government to regulate economic conduct. In arguing to the contrary, petitioners and certain of their *amici* rely on the Court's recent decisions in *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552 (2011), and *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015). But those holdings do not work a change in the way the Court has distinguished between speech and conduct. And as commentators have noted, mistakenly

reading these decisions in such a fashion would jeopardize a wide range of vital state and federal interests.

Reed and *Sorrell* are fully consistent with this Court's longstanding view that regulated activity must communicate some comprehensible and particularized message, on its own, to qualify as speech protected by the First Amendment. What these decisions clarified is that laws may not escape First Amendment scrutiny simply by burdening *all* the possible messages within a particular genre of communication or topic area. Although less "egregious" than viewpoint-based discrimination (*Reed*, 135 S. Ct. at 2223), these sorts of laws nevertheless are a form of content-based speech discrimination. In *Reed* and *Sorrell*, any *specific* marketing materials (as in *Sorrell*) or *specific* church signs (as in *Reed*) undoubtedly would have had to communicate some particularized message to qualify for First Amendment protection in the first place. That is, the regulated activities covered by the statute at issue in *Sorrell* and the town ordinance at issue in *Reed* fell squarely on what is recognized to be the "speech" side of the speech/conduct line.

As the Court noted in *Sorrell*, a content-based limit on speech may concern, not one "particularized message," but a whole genre or category of communication encompassing many different possible messages. There, a Vermont law placing restrictions on the use that could be made of physician-identifying prescription information did not restrict what sorts of statements marketers could make with that information in hand. Rather, the law swept more broadly, banning the use of that information in *any* kind of marketing. Although Vermont argued that

the law regulated conduct, the Court found that it precluded the use of specified information "for marketing" and thus "disfavor[ed] marketing, that is, *speech* with a particular content," an aspect of "educational communication." 564 U.S. at 564.

Similarly, *all* messages advertising religious services were disfavored in *Reed*, although the challenged ordinance did not disfavor any particular religious message or any particular religion's sign. And although "[g]overnment discrimination among viewpoints * * * is a more blatant and egregious form of content discrimination," "[t]he First Amendment's hostility to content-based regulation [also] extends * * * to prohibition of public discussion of an entire topic." *Reed*, 135 S. Ct. at 2230 (internal citations and quotation marks omitted).

It is unquestionable that any given church sign regulated by the Town of Gilbert, or any given marketing materials affected by the Vermont statute, would communicate a particularized message comprehensible by the viewer or listener. Thus, although the general "content-based" regulations at issue in *Sorrell* and *Reed* swept broadly, burdening *all* the various possible messages within a given subject area or genre, nothing about these decisions changed the Court's existing First Amendment framework insofar as it applies here: it remains the case that regulations of speech "are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell*, 564 U.S. at 567.

For this reason, commentators have warned that an expansive reading of *Sorrell* and *Reed* would pose the risk of "Doctrinal Distortion" (Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 Wm & Mary L. Rev. 1613, 1634 (2015)) that

would offer a boon to litigators "seeking a way of fighting against some form of regulation or prosecution." *Id.* at 1629. That process could "devitaliz[e]" the First Amendment by, as Justice Powell warned for the Court, extending the First Amendment's protection to the economic realm in a way that "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect" to traditionally protected noncommercial speech. *Id.* at 1635 n.109 (quoting *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)).

Others, including members of the Court, have invoked *Lochner* v. *New York*, 198 U.S. 45 (1905), suggesting that applying the First Amendment to non-expressive conduct could make it into a "powerful engine of constitutional deregulation." Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165, 167 (2015). See *Sorrell*, 564 U.S. at 591-592 (Breyer, J., dissenting). Thus, if the terms "content-based" and "speaker-based" are stretched beyond their definitional limits so as to include conduct, nearly all economic regulations would be vulnerable to First Amendment challenge—a result that "would transfer from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives." *Sorrell*, 564 U.S. at 585 (Breyer, J., dissenting). That would leave the Court with "no limiting principle and * * * would render self-government impossible." Amanda Shanor, *The New Lochner*, 2016 Wisc. L. Rev. 133 (2016).

One can easily imagine examples of this problem. The use of fireworks, for instance, can be expressive, and the act of selling them may—like most commer-

cial transactions—involve words. They also are dangerous, and their use and sale is often highly regulated. If their potential expressive quality converts the sale of fireworks into speech, an expansive reading of *Sorrell* and *Reed* would subject laws regulating fireworks sales to strict scrutiny because they target only fireworks purveyors and incidental fireworks-related communication. That would be a dramatic, and destructive, turn in the law.

Evidently recognizing this danger, petitioners state that this "is not a case about '*Lochner*-ization," suggesting that few New York laws likely would be affected if Section 518 were struck down. Pet. Br. 34-35. But the doctrinal consequences of treating pricing as speech rather than conduct would be widely felt.

Under petitioners' theory, for example, federal discount restrictions on tobacco products could be unconstitutional regulations of "pricing speech."[4] Similarly, the space explicitly left by Congress for local and state experimentation with stricter tobacco restrictions would be at risk if pricing were treated as protected speech.[5] Or "happy hour" regulations in numerous States that restrict reducing the price of

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[4] See, *e.g.*, Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776 (codified at 21 U.S.C. § 301 et seq.) (prohibiting the sale of tobacco products through mail-order coupon redemption).

[5] See, *e.g.*, Cal. Health & Safety Code § 118950 (West 2008) (prohibiting distribution of coupons and rebate offers for tobacco products); Md. Code Ann., Crim. Law § 10-107(b)(2) (West 2007) (prohibiting the distribution of tobacco coupons to minors); Tex. Health & Safety Code §161.087(a) (West 2015) (same).

alcoholic drinks could be unconstitutional limits on speech.[6]

All of these, and myriad other similar regulations, are directed at particular forms of pricing. Such rules logically are understood to be regulations of conduct. Nothing in *Sorrell*, *Reed*, or any other decision of this Court converts such everyday pricing regulations into restrictions of speech.

D. Even If The Surcharge Prohibition Incidentally Limits Expression, The Law Survives First Amendment Scrutiny.

This Court's First Amendment jurisprudence strongly supports classifying the regulated activity in this case—standard terms of pricing—as conduct, not speech. But the Court has also recognized that certain forms of regulated activity can mix elements of speech and conduct. "When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

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[6] See, *e.g.*, 204 Mass. Code Regs. 4.03(1)(c) (West 2016) (providing that no liquor licensee may "sell, offer to sell or deliver to any person or group of persons any drinks at a price less than the price regularly charged for such drinks during the same calendar week, except at private functions not open to the public"); 3 R.I. Gen. Laws Ann. § 3-7-26(a)(1)-(3) (West 2009) (no liquor licensee may "[c]ause or require any person or persons to buy more than one drink at a time by reducing the price of that drink" or "[s]ell, propose to sell or deliver to any person or persons an unlimited number of drinks during a certain period of time for a fixed price").

Here, if standard terms of pricing are thought to be a mixture of speech and conduct, the surcharge prohibition would be constitutional under the test articulated in *O'Brien*. This test, which is similar to but less stringent than the standard governing regulations of commercial speech stated in *Central Hudson*, asks whether the government interest (1) is "substantial" and (2) "unrelated to the suppression of free expression," and (3) the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 376, 377. The surcharge prohibition satisfies all three prongs of this test.

First, there can be no question that the government has a substantial interest in standardizing the terms of pricing disclosed to consumers. Requiring that retailers disclose their prices in a particular, standard set of terms allows consumers to make apples-to-apples comparisons between those selling products or services. This is precisely the logic behind the requirement in the Truth in Lending Act, 15 U.S.C. § 1601, that most consumer credit transactions disclose the annual percentage rate, or APR.[7] "The APR, which must be disclosed in nearly all consumer credit transactions, is designed to take into account all relevant factors and to provide a uniform measure for comparing the cost of various credit transactions."[8] There may be many alternative mathematically equivalent ways to express an inter-

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[7] That is how the Federal Reserve explains the APR requirement in its Consumer Compliance Handbook (at 10) for the Truth in Lending Act's Regulation Z, at https://perma.cc/SQ27-QTAQ.

[8] *Id.* at 9.

est payment, but the State undoubtedly has a substantial reason for standardizing these terms.[9]

Aside from the State's broad interest in standardizing price disclosures in general, the decision to ban surcharging in particular—charging a higher price than the sticker price—serves other, related economic interests. This is because, as the New York legislature recognized, surcharges cause unique harms that discounts do not.

Two of these harms relate to consumer protection, where the State has a clear and substantial interest. For one thing, the sticker price is by its very nature the one that is most visible and comprehensible to a consumer. Given that not all consumers will notice or digest additional disclosures beyond that price, the prohibition on surcharges ensures that consumers never mistakenly pay more than the clearest and most visible price. See Raj Chetty et al., *Salience and Taxation: Theory and Evidence*, 99 Am. Econ. Rev. 1145, 1146 (2009) (finding a decline in consumer demand when surcharges are disclosed before the point of sale). If the highest price is not the one on display, a consumer could experience the surcharge as a surprise, learning of the extra cost only after swiping a card and receiving the receipt. By

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[9] As the Scholars of Behavioral Economics rightly point out in their *amicus* brief in support of the petition, "the public policy implications of different frames can be profound. For example, the 'miles per gallon' formulation for vehicle fuel efficiency is misleading compared to a 'gallons per mile' frame." Scholars of Behavioral Economics in Support of Petition Br. 11. While not about pricing as such, this example actually supports *respondents'* contention that the State has a legitimate consumer-protection interest in promoting certain standard pricing terms over other mathematically equivalent ones.

this point, it is too late to stop a transaction that the consumer might not have made if all costs were incorporated in the sticker price. See Todd J. Zywicki et al., *Behavioral Law and Economics Goes to Court: The Fundamental Flaws in the Behavioral Law & Economics Arguments Against No-Surcharge Laws* 9 (Intl. Cent. Law & Econ. Fin. Reg. Research Prog. Paper, 2016), *availabe at* https://perma.cc/45ZA-VSWW ("When a consumer is met at the register with a *higher* price than that posted when she selected the store or chose her items * * * there is an element of deception in the price"). An unexpected discount does not carry the same risk.

In addition, and relatedly, surcharges have no ceiling: they can deviate upward as far from the base price as the retailer feels it can get away with. Economists have voiced this concern. See Hélène Bourguignon, Renato Gomes & Jean Tirole, *Card Surcharges and Cash Discounts: Simple Economics and Regulatory Lessons*, 10(2) Competition Pol'y Int'l 13, 21 (2014) ("Because merchants use card surcharges as a price discrimination device * * *, the merchant always 'overshoots' in the surcharge * * * In contrast, because cash discounts are a costly gift to consumers, the merchant always 'undershoots' in the discount."). This creates the opportunity for "windfall profits"—in excess of what credit card companies charge the retailers—that come out of the pockets of consumers. See *supra*, at 17-18 (noting examples from Australia, the Netherlands, and the United Kingdom); see also Wilko Bolt, Nicole Jonker & Corry van Renselaar, *Incentives at the Counter: An Empirical Analysis of Surcharging Card Payments and Payment Behaviour in the Netherlands*, 34 J. Banking & Fin. 1738, 1739-41 (2010) (discussing how allowing merchants in cer-

tain industries to impose surcharges affects customers).

Further, because retailers already factor in consumer behavior when setting prices, surcharging allows a retailer to extract more in single-sticker situations. Retailers may end their price with the number "9"—as in $9.99 rather than $10—because "nine-ending prices are perceived to be smaller than a price one cent higher." Manoj Thomas & Vicki Morwitz, *Penny Wise and Pound Foolish: The Left-Digit Effect in Price Cognition*, 32 J. Consumer Res. 54, 54 (2005); see also Mark Stiving & Russell S. Winer, *An Empirical Analysis of Price Endings With Scanner Data*, 24 J. Consumer Res. 57, 57 (1997) ("Surveys support the premise that firms set prices to appear that they are just below a round number."). Surcharges allow retailers to take advantage of this anchoring effect while consumers pay the very price they sought to avoid.

The observation that a surcharge may be mathematically equivalent to a discount is thus beside the point in many ordinary commercial settings: if a retailer prices a product at $99 with a two percent credit surcharge, it is more likely to make the sale, while getting more from consumers in the process. See Hélène Bourguignon, Renato Gomes, & Jean Tirole, *Card Surcharges and Cash Discounts: Simple Economics and Regulatory Lessons*, 10(2) Competition Pol'y Int'l 13 (2014).

Second, these substantial state interests—standardizing the terms of pricing and preventing the specific economic harms tied to surcharging—satisfy the second prong of the *O'Brien* test, as all are "unrelated to the suppression of free expression." *O'Brien*, 391 U.S at 377. To the extent that retailers

wish to express their unhappiness with the fees imposed by credit card companies, complain explicitly about the State's policy decisions, or even actively attempt to persuade consumers to make economic decisions at odds with the State's regulatory goals, they are free to do so through any means of expression they choose. Again, the State did not attempt to prohibit any of these expressive activities.

Third, it is clear that any incidental impact on speech following from the surcharge prohibition, to the extent that one exists, is "no greater than is essential to the furtherance of [the State's] interest." *O'Brien*, 391 U.S. at 377. The State cannot standardize the terms of pricing—or prohibit a harmful pricing arrangement—without affecting in some fashion the numbers and labels that retailers use to disclose those terms to consumers. Like regulations that require "miles per gallon" disclosures instead of "gallon per mile" disclosures (Scholars of Behavioral Economics in Support of Petition Br. 11), the law thus does have some incidental impact on the words and numbers that that sellers of goods or services may use in communicating the pricing scheme accurately. But this impact is no broader than the words and numbers necessarily used to disclose the pricing terms to consumers.

For these reasons, even if this Court finds that the no-surcharge law regulates an activity best characterized as a mixture of speech and conduct, the law clearly satisfies each prong of the *O'Brien* test and survives First Amendment scrutiny.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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EXPRESSIONS HAIR DESIGN, et al.,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity
as
Attorney General of the State of New York, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICUS CURIAE NEW YORK CREDIT UNION ASSOCIATION IN SUPPORT OF RESPONDENTS

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NYLS' Governor's Bill Jacket to ch. 160, S. 8367, Assemb. 10189 (NY 1984) 17

Other Authorities

Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. REV. 1321 (2008) 16

FEDERAL RESERVE SYSTEM, THE 2013 FEDERAL RESERVE PAYMENTS STUDY: RECENT AND LONG-TERM TRENDS IN THE UNITED STATES: 2000-2012 (2014), *available at* https://www.frbservices.org/files/communications/pdf/general/2013_fed_res_paymt_study_detailed_rpt.pdf 13

Feedback statement on European Commission Green Paper, Towards an integrated European market for card, internet and mobile payments, COM (2011) 0941 final (June 27, 2012), *available at* http://ec.europa.eu/internal_market/payments/docs/cim/gp_feedback_statement_en.pdf 16

Letter from Gerard Brody, Dir., Policy and Campaigns, and David Leermakers, Senior Policy Officer, Consumer Action Law Ctr. to the Reserve Bank of Austl. (Feb. 9, 2012), *available at* http://consumeraction.org.au/wp-content/uploads/2012/04/A-Variation-to-Surcharging-Standard.pdf 12

OFFICE OF FAIR TRADING (U.K.), THE IMPACT OF PRICE FRAMES ON CONSUMER DECISION MAKING 21–25 (2010), *available at* http://webarchive.nationalarchives.gov.uk/20140402142

426/http:/www.oft.gov.uk/shared_oft/economic_research/OFT1226.pdf 14

RESERVE BANK OF AUSTRALIA, GUIDANCE NOTE: INTERPRETATION OF THE SURCHARGING STANDARDS (2012), *available at* http://www.rba.gov.au/payments-and-infrastructure/cards/201211-var-surcharging-stnds-guidance/guidance-note.html 12

RESERVE BANK OF AUSTRALIA, REVIEW OF CARD PAYMENTS REGULATION: CONCLUSIONS PAPER 14–15 (2016), *available at* http://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/pdf/review-of-card-payments-regulation-conclusions-paper-2016-05.pdf 12

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STATEMENT OF INTEREST

The New York Credit Union Association is a century-old institution dedicated to advancing and protecting the interest of credit unions.[1] Credit unions are member owned not for-profit cooperatives which, unlike banks, cannot rely on stocks to increase their capital.

The outcome of this case may have a direct financial impact on New York credit unions, approximately half of whom offer credit cards and receive interchange income.

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[1] All parties have consented to the filing of this Brief. Such consents shall be submitted herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

State no-surcharge laws regulate economic conduct and do not unconstitutionally restrict speech conveying price information.

The opinion of the District Court below begins quite colorfully with a reference to Lewis Carroll's *Through the Looking Glass*. *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 435 (2013) ("Alice in Wonderland has nothing on section 518 of the New York General Business Law."). Petitioners and Humpty Dumpty share something in common: they both believe that words mean only what they want them to mean. *See* LEWIS CARROLL, THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE 124 (1871) ("When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things.").

In this case, petitioners have decided that "surcharge" and "discount" have the same meaning because, in some cases, either mechanism can result in the same price. Amicus urges the Court's caution, for "[u]nless we are to assume an Alice-in-Wonderland world where words have no meaning," *Welsh v. United States*, 398 U.S. 333, 354 (1970) (Harlan, J., concurring), the very real differences between surcharges and discounts and their divergent economic and social implications, and New York's decision to permit the latter while forbidding the former, should be respected.

The New York State Legislature passed New York General Business Law Section 518 based on the understanding that surcharges and discounts are in fact separate and distinct pricing mechanisms, and not merely two words for the same conduct. The state, in a valid exercise of its police power, determined that it was in the public interest to prohibit a merchant from imposing a surcharge above the headline price on a consumer who chooses to pay with a credit card. It does not prohibit merchants from describing their pricing structures in their own words, or from engaging in advocacy regarding their desire to charge more to consumers who pay with credit cards.

In other words, section 518 regulates what merchants may do, not what they may say. This is clear from the plain meaning of the statute, and any argument to the contrary consequently must fail.

Moreover, the effects of surcharging are no longer confined to the realm of economic speculation. Australia, the European Union, and the United Kingdom have all either eliminated or severely restricted the use of merchant surcharges in recent years. These developments have been prompted by mounting evidence that surcharging does not provide a mechanism to recoup merchant transaction costs, but instead constitutes a source of revenue derived from consumers who have no way to ascertain the actual cost of credit.

Take, for example, the pricing structure that Petitioner Expressions Hair Design employs. Expressions Hair Design charges customers a three-

percent surcharge over the headline price for customers who choose to pay for their haircuts with credit cards. J.A. 60; Pet. Br. at 20. Although they claim to have changed their signage after learning of the law in question, they apparently have not changed this price structure. *See* Pet. Br. at 20; J.A. at 60–61. Therefore, Expressions Hair design imposes a three-percent surcharge on consumers who pay with credit cards, even though their actual costs of accepting those cards may significantly less in many cases.[2] Consumers have no way of knowing what Expressions' actual costs of card acceptance are, and they have no way of knowing that part of the "surcharge" is actually just increased revenue, unrelated to the cost of accepting credit.

The state's compelling interest in shielding consumers from the harm that results from credit card surcharging, as evidenced by the examples of other countries, cannot reasonably be questioned. Petitioners argue that the First Amendment prohibits states from banning surcharges while simultaneously authorizing cash discounts; but no-surcharge laws are economic regulations that do not infringe on merchants' rights of Free Speech, and petitioners cannot invoke the First Amendment to accomplish in the Supreme Court what must be done in the chambers of Congress or state legislatures.

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[2] *See Merchant Processing Fees in the U.S.*, NILSON REPORT, May 2014, at 12, *available at* https://www.nilsonreport.com/upload/issues/1041_0002.pdf (Noting that the average credit card acceptance fee for all Visa and MasterCard cards was 2.17% in 2013).

In this case, petitioners have draped their challenge to a valid economic regulation in the garb of Free Speech, a masquerade designed to achieve in Court what must be done in Congress or state legislatures. It is a clever but disingenuous means of allowing large retailers to maximize profits at the expense of consumers.

It trivializes the very freedom protected by the first amendment.

Accordingly, the Court should affirm the judgment of the Second Circuit and hold that New York's no-surcharge law regulates economic conduct, not speech.

SUMMARY OF ARGUMENT

New York General Business Law section 518 prohibits merchants from charging more than the headline price for purchases made with a credit card, while permitting merchants to offer cash discounts. N.Y. GEN. BUS. LAW § 518 (McKinney 2016). It is a classic regulation of economic activity. The petitioners contend that section 518 serves no legitimate purpose. To contrary, section 518 serves to protect consumers and the economy.

In fact, Australia, the European Union, and the United Kingdom have all authorized surcharging, only to subsequently eliminate or restrict its use. Their experience demonstrates that if New York's law is struck down, consumers will be forced to pay surcharge fees far in excess of merchant transaction costs. Furthermore, existing statutes banning unfair and deceptive practices will not be sufficient to prevent excessive charges.

Furthermore, section 518 question does not violate the first amendment because it does not regulate speech. It regulates economic conduct.

Therefore, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. Surcharge bans provide states the most effective means of protecting consumers against excessive credit card costs.

The Court's "decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power." *Nebbia v. New York*, 291 U.S. 502, 525 (1934). This case is no different. And like the cases that have come before it, Petitioners attempt to strike down a valid regulation of economic conduct on First and Fourteenth Amendment grounds should not succeed.

It is well-settled that "[s]tates are accorded wide latitude in the regulation of their local economies under their police powers." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Regulations of economic conduct, specifically those regulating pricing activity, have existed in the United States "from its first colonization," *Munn v. Illinois*, 94 U.S. 113, 125 (1876), and the Court has consistently upheld such laws under rational basis review. *See, e.g., Mobile Oil Exploration & Producing Se. Inc. v.*

United Distrib. Cos., 498 U.S. 211, 221-26 (1991) (upholding law regulating the price of natural gas); *Nebbia*, 291 U.S. at 537 (upholding law fixing milk prices). Notably, such laws have never before been held to unconstitutionally restrict speech. Rather, they have been upheld as valid regulations of economic conduct.

Petitioners' First Amendment argument, as augmented by amici, suggests that there is no

justification for section 518 other than to protect the interests of credit card companies. *See* Brief of Petitioner ("Pet. Br.") at 1, 8, 9, 11, 14–16; Brief of Professor Adam J. Levitin as Amicus Curiae Supporting Petitioners at 11–13 [hereinafter Levitin Br.]. They argue that, without this statute, merchants, unshackled by surcharge prohibitions, will dutifully charge credit card users no more than the cost of processing credit card transactions. *See* J.A. at 43, 47, 51, 56; Brief for Consumer Action and National Association of Consumer Advocates as Amici Curiae in Support of Petitioners at 2, 5, 6 [hereinafter Consumer Action Br.]. They claim that, with the cost of providing credit borne by the party who chooses to use it, patrons using cash will benefit from lower prices, which will be particularly helpful to poorer consumers who cannot afford the convenience of credit.

Fortunately for the Court, the impact of surcharges is no longer confined to theoretical constructs. Over the last decade, Australia, the European Union, and the United Kingdom have all authorized credit card surcharges, only to eliminate them or severely restrict their use in the last few years. These experiences are instructive because they show that statutes like New York's reflect substantive policy preferences. They are precisely the type of economic regulation that has long been recognized as being within the scope of legislative powers. Plainly, they do not restrict speech.

A. In countries where they are authorized, surcharges inevitably become a source of merchant revenue instead of a mechanism to recoup transaction costs.

In 2011, a consumer group lodged a formal "super complaint"[3] supported by over 40,000 petitioners, with the U.K. Office of Fair Trading (OFT). It alleged that merchants in general, and the travel and tourism industries in particular, routinely imposed surcharges "many times" the additional costs the retailer would incur for accepting card payments. *See* Which? Super-Complaint: Credit and Debit Surcharges ii, vi, submitted to Office of Fair Trading (U.K.) March 30, 2011, *available at* http://www.staticwhich.co.uk/documents/pdf/payment-method-surcharges-which-super-complaint-249225.pdf.

The complaint further alleged that consumers often have no effective payment alternatives such as when needing to book a seat on a crowded flight or paying for an online purchase. *See id.* at 58–62. For example, surcharge fees represented up to fourteen percent of ticket prices. *Id.*

In 2012, following a government investigation, the United Kingdom enacted regulations banning excessive surcharges. The legislation made it illegal for merchants to charge fees that exceeded a payment

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[3] A "Super Complaint" is a complaint filed by designated consumer groups to which it has to respond, *See* Enterprise Act, 2002, c. 40, § 11(U.K.).

method's cost of acceptance. The Consumer Rights (Payment Surcharges) Regulations, 2012, S.I. 2012/3110 (U.K.). The regulation was intended to address "the dilution of price transparency" resulting from card surcharges in excess of merchant costs, "typically employed as a form of drip pricing." *See* Impact Assessment: Payment Surcharges at 1, I.A. 2012/BIS0380, *available at* http://www.legislation.gov.uk/ukia/2012/437/pdfs/ukia_20120437_en.pdf. Among the stated policy objectives and intended effects was for "[p]ayment surcharges to become more cost reflective." *Id.*

The European Union took an even more decisive step in 2015, however, when it coupled a ban on interchange fees for almost all credit and debit card transactions with a corresponding ban on surcharges. Directive 2015/2366, of the European Parliament and of the Council of 25 November 2015 on Payment Services in the Internal Market, art. 62, ¶ 4, 2015 O.J. (L337) 35 (EU). The European Commission concluded in its Impact Assessment that, "in those countries where surcharging is allowed, surcharges are sometimes exploited by retailers who applied excessive surcharges to increase their revenues." *Impact Assessment, Proposal for a Directive of the European Parliament and of the Council on Payment Services in the Internal Market and Proposal for a Regulation of the European Parliament and of the Council on Interchange Fees for Card-Based Payment Transactions*, at 25, SWD (2013) 0288 final (July 24, 2013).

This occurred even though a prior E.U. directive ostensibly prohibited excessive surcharging. *See id.*; Directive 2011/83, of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, art. 19, 2011 O.J. (L394) 64 (EU). Notably, prior to the enactment of Directive 2015/2366, fourteen member countries of the European Union had already banned surcharging altogether. *Report from the Commission to the European Parliament and the Council on the Application of Directive 2007/64/EC on Payment Services in the Internal Market and on Regulation (EC) No. 924/2009 on Cross-Border Payments in the Community*, at 7, COM (2013) 0549 final (July 24, 2013).

Even Australia, which was in the forefront of eliminating credit card surcharge bans in 2003, has moved to severely restrict them. Initially, it authorized merchants to surcharge without restriction, believing that this "open ended" approach would drive down interchange fees with little if any negative impact on consumer costs. *See* RESERVE BANK OF AUSTRALIA, A VARIATION TO THE SURCHARGING STANDARDS: A CONSULTATION DOCUMENT 2–3 (2011), *available at* http://www.rba.gov.au/publications/consultations/201112-variation-surcharging-standards/pdf/201112-variation-surcharging-standards.pdf; *See also* Michele Bullock, *A Guide to the Card Payment System Reforms*, RBA BULLETIN, Sept. 2010, at 56–58, *available at* http://www.rba.gov.au/publications/bulletin/2010/sep/pdf/bu-0910-7.pdf.

Eventually, evidence of excessive surcharging resulted in calls for change. As one consumer group explained, the practice was becoming widespread and was of particular concern in situations where consumers have little ability to choose alternative payment methods, such as booking flights online. Letter from Gerard Brody, Dir., Policy and Campaigns, and David Leermakers, Senior Policy Officer, Consumer Action Law Ctr. to the Reserve Bank of Austl. (Feb. 9, 2012), *available at* http://consumeraction.org.au/wp-content/uploads/2012/04/A-Variation-to-Surcharging-Standard.pdf. By 2015, airlines were regularly imposing surcharges exponentially higher than processing costs.[4]

The Reserve Bank of Australia responded by giving credit card companies the right to limit surcharges to "the reasonable cost of acceptance," and providing guidance as to what costs could be included in a surcharge. RESERVE BANK OF AUSTRALIA,

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[2] In March 2015, Australian airlines imposed the following surcharges:

> Qantas: $7 card payment fee on a $200 ticket = 3.5% surcharge.
> Virgin: $7.70 card payment fee on a $135 ticket = 5.70% surcharge.
> Jetstar: $8.50 card payment fee on a $85 ticket = 10% surcharge.
> Tiger: $8.50 card payment fee on a $95 ticket = 8.95% surcharge.

See Andy Kollmorgen, *Surcharging Bans Take Effect*, CHOICE.COM.AU, https://www.choice.com.au/money/credit-cards-and-loans/credit-cards/articles/accc-to-put-a-stop-to-excessive-credit-card-surcharging (last updated September 1, 2016).

GUIDANCE NOTE: INTERPRETATION OF THE SURCHARGING STANDARDS (2012), *available at* http://www.rba.gov.au/payments-and-infrastructure/cards/201211-var-surcharging-stnds-guidance/guidance-note.html. But this did not allay the concerns of the public and policy makers.

In 2015, the Australian Legislature passed an amendment to the Competition and Consumer Act of 2010 to ban excessive and unfair payment surcharging by merchants. Regulations effective in September of 2016 impose detailed restrictions on what costs can be considered by merchants imposing surcharges and generally limit them to the average cost of card acceptance. *See* RESERVE BANK OF AUSTRALIA, REVIEW OF CARD PAYMENTS REGULATION: CONCLUSIONS PAPER 14–15 (2016), *available at* http://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/pdf/review-of-card-payments-regulation-conclusions-paper-2016-05.pdf.

B. Merchants exercise monopoly control over how large a surcharge consumers pay.

Surcharge advocates envision a world in which consumers, deterred from using credit cards, turn to less expensive forms of payment. *See* Pet. Br. at 7; Brief for Alan S. Frankel as Amicus Curiae in Support of Petitioners at 6; Consumer Action Br. at 11. But as the Which? Super Complaint explains, *see supra* Part I.A, even when a retailer "offers a number of alternative payment methods, that retailer retains a monopoly on the setting of the prices that the

customer will pay for different payment methods." Which?, *supra*, at iii.

Moreover, consumers are increasingly dependent on credit cards to facilitate timely purchases. These findings will not surprise anyone who has recently gone online for a last-minute holiday present. *See* FEDERAL RESERVE SYSTEM, THE 2013 FEDERAL RESERVE PAYMENTS STUDY: RECENT AND LONG-TERM TRENDS IN THE UNITED STATES: 2000-2012 13–14, 17 (2014), *available at* https://www.frbservices.org/files/communications/pdf/general/2013_fed_res_paymt_study_detailed_rpt.pdf. In many of these circumstances, merchants have an effective monopoly over how much the consumer pays to complete the transaction.

As a result, instead of encouraging consumers to use cheaper payment methods, consumers feel they have little choice but to pay highly excessive fees. In Australia, despite the imposition of fees clearly in excess of processing costs, eighty-eight percent of online survey respondents indicated that they had paid a credit card surcharge in the previous year; more than fifty percent paid a surcharge between one and five times, while twenty-two percent paid surcharges more than ten times in the previous twelve months. *See* CHOICE REPORT: CREDIT CARD SURCHARGING IN AUSTRALIA 7–10 (2010), *available at* http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Credit_card_surcharges_part1.pdf.

C. Credit card surcharges promote misleading pricing tactics and dubious marketing schemes that exploit among the most powerful of pricing biases.

If section 518 is struck down, consumers will be led to believe that surcharges reflect the "true cost of credit," *see, e.g.*, Pet. Br. at 1, 8, 11 & n.2; Levitin Br. at 5; Brief for Ahold U.S.A., Inc. et al. as Amici Curiae in Support of Petitioners at 7, 30; when in reality, the amount of the surcharge is in no way tethered to the merchant's cost of accepting credit cards. This result serves to distort rather than clarify the "true cost of credit."

For example, an analysis of the United Kingdom's surcharge legislation concluded that surcharging resulted in distorted price signals by encouraging retailers to use "drip pricing" techniques that made it difficult for consumers to identify and respond to transaction costs. *See* Impact Assessment: Payment Surcharges, *supra*, at 2. Specifically, the legislation's Impact Assessment states that "surcharges are typically employed as a form of drip pricing, whereby the consumer does not see the final transaction price until after completing several forms. This is to the detriment of consumers as they cannot effectively compare prices to secure the best deals." *Id.*

In restricting surcharging, the British Government surmised that even though merchants were likely to charge higher prices for their products,

consumers would, on balance, benefit by receiving more accurate price information. *See id.*

In addition, merchants know that consumers anchor their price assumptions based on the lowest price they see. OFFICE OF FAIR TRADING (U.K.), THE IMPACT OF PRICE FRAMES ON CONSUMER DECISION MAKING 21–25 (2010), *available at* http://webarchive.nationalarchives.gov.uk/20140402142426/http:/www.oft.gov.uk/shared_oft/economic_research/OFT1226.pdf. A body of experimental research offers empirical evidence regarding impact of price framing on consumer choice. In an auction experiment, participants were instructed to bid for a jar of pennies. *Id.* at 22. One group was told that they must pay fifteen cents in addition to the bid if they won the auction. *Id.* at 22–23. A second group was told that if they won the bid, the price they would pay would simply be the bid price. *Id.* at 23. The group that was not told the full price showed a higher level of demand for the pennies, reflected in the fact that they were more likely to increase their bid than the group that knew that total price. *Id.*

Similarly, in another experiment, consumers were told the prices of a telephones, with one group seeing the total cost including shipping and handling, and another group seeing the base price with additional charges reported separately. *Id.* Participants in the group that was shown partitioned pricing, in which the base price and surcharges were reported separately, consistently recalled lower total prices than the group given the total price. *Id.*

Unrestricted credit card surcharging allows merchants to take advantage of this pricing bias through drip pricing and other dubious pricing and marketing strategies. These tactics are designed to maximize profits at the expense of consumers. No-surcharge laws are designed to protect consumers from such practices and are thus legitimate economic regulations. They have nothing to do with speech.

D. Banning "excessive surcharges" will not protect consumers from the negative consequences of surcharging.

Petitioners argue that section 518 fails the fourth prong of the Court's test for commercial speech announced in *Central Hudson*[5] because excessive surcharging can be addressed by proper disclosures and enforcement of existing laws banning deceptive advertising. *See* Pet. Br. at 41–42. As described above, the experience of countries that have authorized surcharging tells a different story.

In eliminating surcharges, the European Union, in particular, concluded that it was difficult to establish cost categories and "that there was no practical way to enforce this provision or to control how these costs are calculated by merchants." *See Feedback statement on European Commission Green Paper, Towards an integrated European market for card, internet and mobile payments*, at 17, COM (2011) 0941 final (June 27, 2012), *available at* http://ec.europa.eu/internal_market/payments/docs/ci

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[5] Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980).

m/gp_feedback_statement_en.pdf. At the same time, there was general support among market participants for continuing to allow merchants to offer rebates. *Id.*

Excessive surcharges cannot easily be defined or identified. An effective regulation would have to capture the costs incurred by large retailers such as Walmart as well as smaller merchants like Expressions Hair Design. It would involve calculating not only direct costs such as fees paid to the merchant's processing bank, but also indirect costs ranging from the costs of fraud to the costs of payment terminal rentals. The information would then have to be calculated by merchants and periodically updated to reflect changed circumstances. *See Reserve Bank of Australia, Standard No. 3 of 2016, Scheme Rules Relating to Merchant Pricing for Credit, Debit and Prepaid Card Transactions* s 4, *available at* http://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/conclusions-paper-may2016/appendix-a.html.

Notably, while surcharges are difficult to quantify and require statutorily-imposed caps to protect consumers, discounts such as those authorized by section 518 have a built-in mechanism for ensuring that merchants can recover their costs without harming consumers. This is because a "merchants' ability to discount is limited by the spread between the credit price and the merchandise cost to the merchant. If the merchant offers discounts by more than that spread, the merchant will lose money on the transaction." Adam J. Levitin, *Priceless? The*

Economic Costs of Credit Card Merchant Restraints, 55 UCLA L. REV. 1321, 1352 (2008). In contrast, surcharges have no such internal mechanism for controlling the amount of the price differential; in a landscape of unrestricted surcharging, it is open season for merchants to impose surcharges well in excess of their costs.

E. The legislative history of section 518 demonstrates that New York anticipated the negative consequences of surcharging experienced in other countries.

Petitioners frame New York's no-surcharge law as "criminaliz[ing] truthful, non-misleading speech that best informs consumers about the cost of credit cards." Pet. Br. at 26–27. To the contrary, no-surcharge laws protect against deceptive, misleading conduct that obfuscates the true cost of credit and creates opportunities for windfall profits for merchants to the detriment of consumers. The legislative history of section 518 demonstrates that the New York State Legislature passed this law for precisely this reason. *See* NYLS' Governor's Bill Jacket to ch. 160, S. 8367, Assemb. 10189, at 5 (NY 1984).

Through section 518, the New York State Legislature intended to address "an unfair disadvantage" faced by credit card users as a result of the expiration of the federal surcharge ban in February 1984. *Id.* The Legislature feared that "the consumer would be subject to dubious marketing practices and variable purchase prices." *Id.*

In other words, the unbridled ability of merchants to impose credit card surcharges would leave consumers vulnerable to deception at the point of sale, and would allow for excessive surcharging beyond the recovery of the merchant's costs. The experiences of Australia, the European Union, and the United Kingdom demonstrate that these concerns were not unfounded.

II. SECTION 518 DOES NOT TRIGGER FIRST AMENDMENT PROTECTIONS.

A. New York General Business Law section 518 imposes a ban on credit card surcharges above the headline price.

Since New York bans surcharges while permitting cash discounts, it may or may not be permissible for a merchant to charge $100 to a consumer buying a widget in cash and $102 for purchasing the same product with a credit card. Contrary to the position of the petitioners, however, the legality of this conduct does not hinge on how the merchant chooses to characterize the price differential, but on whether the widget's headline price is higher than the credit card price. If it is, then the price differential is a cash discount, a perfectly legal price incentive.

This distinction has been understood in New York for over three decades. In *People v. Fulvio*, a gas station owner who was charged with violating section 518 did not dispute that he charged customers who paid with credit cards more than those paying in cash. *See People v. Fulvio*, 514 N.Y.S.2d 594, 596 (N.Y.

Crim. Ct. 1987). The legality of this conduct hinged not on whether the defendant implemented a price differential, but whether the price differential was the result of a surcharge above the headline cash price. As the court explained, the "[d]efendant's contention that the charge for gasoline in excess of the cash price was a cash discount and not a surcharge may, if sufficiently demonstrated by him, be a valid trial defense to . . . General Business Law § 518." *Id.* at 596–97.

In addition, the Legislature has taken this approach in protecting New Yorkers who are more comfortable dealing with the postal service than email. State law prohibits businesses from charging consumers an additional rate, fee, or fee differential for receiving billing statements or making payments by mail, while permitting them to offer consumers "a credit or other incentive to elect a specific payment or billing option." N.Y. GEN. BUS. LAW § 399-zzz (McKinney 2016). The result is that consumers agreeing to make online payments often pay less when paying their bills than do consumers who pay through the mail.

The constitutionality of section 399-zzz has never been challenged. Any such challenge would surely fail, because it is a valid regulation of economic conduct.

B. Consumers do not construe pricing as merchant expression.

Petitioners contend that the very act of imposing a surcharge constitutes expressive conduct entitled to

First Amendment protection. This is incorrect. The Court "has long recognized that [the First Amendment's] protection does not end at the spoken or written word," *Texas v. Johnson*, 491 U.S. 397, 404 (1989), but the First Amendment's protection of speech is not boundless. The mere fact that a course of conduct necessarily implicates the use of words or labels does not, without more, transform that conduct into protected speech. *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").

To determine whether conduct is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," *Spence v. Washington*, 418 U.S. 405, 409 (1974), the Court asks whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410–11; *Johnson*, 491 U.S. at 404. The Court has held that conduct constitutes protected symbolic speech when it is recognizably tied to a contemporaneous issue or would otherwise clearly be understood as conveying a

message based on the context. *Spence*, 418 U.S. at 410–11 (affixing a peace sign to an American flag); *Tinker v. Des Moines Ind. Comm. School District*, 393 U.S. 503, 514 (1969) (wearing black armbands in school to protest Vietnam War).

The Case presently before the Court is clearly distinguishable from cases in which the Court has found expressive conduct to constitute protected speech. Whereas in *Spence* and *Tinker* "it would have been difficult for the great majority of citizens to miss the drift of" the expressive conduct, *see Spence*, 418 U.S. at 410; *Tinker*, 393 U.S. at 505–14, the act of imposing a credit card surcharge has no inherently communicative qualities, is not tied in any way to a social issue or viewpoint, and would never be understood as intending to express a message. It is quite simply a pricing scheme; an economic activity devoid of communicative intent or comprehensibility.

Petitioners also cite their beliefs regarding the propriety, fairness and effectiveness of the no-surcharge law, its broader impacts, or their beliefs that they could realize significant savings if they could impose surcharges, to support the proposition that surcharging should enjoy First Amendment protection. *See* J.A. at 20, 43, 47, 56, 57, 61. However, the act of surcharging is fundamentally nonsymbolic, and the Court has held that nonsymbolic actions cannot enjoy First Amendment protection, even when the actor is motivated by a particular belief or idea. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011) (finding that the act of voting does not constitute protected speech).

The instant case invokes the Court's holding in *Carrigan*. In *Carrigan*, the Court observed: "the fact that a nonsymbolic act is the product of deeply held personal belief—even if the actor would like it to *convey* his deeply held personal belief—does not transform action into First Amendment speech. Nor does the fact that action may have social consequences . . . ." *Carrigan*, 564 U.S. at 127. The same conclusion is warranted in this case. Neither petitioners' beliefs regarding the wisdom or fairness of New York's no-surcharge law, nor the possibility that such laws may have social consequences, is enough to transform the pricing scheme of surcharging into protected speech.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Dated: December 21, 2016

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Petitioners,

v.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief of Amici Curiae Public Citizen, Inc., Consumers Union, National Consumer Law Center, and the Campaign for Tobacco-Free Kids in Support of Respondents

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QUESTION PRESENTED

Does a New York statute prohibiting merchants from imposing surcharges on customers who pay with credit cards violate the First Amendment?

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Allen Rosenfield, *Point-of-Purchase Bank Card Surcharges: The Economic Impact on Consumers*, New America Found. (May 2010), https://na-production.s3.amazonaws.com/documents/point-of-purchase-bank-card-surcharges 12

Scott Schuh, Oz Shy & Joanna Stavins, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, Fed. Reserve Bank of Boston (Aug. 2010), https://www.bostonfed.org/-/media/Documents/Workingpapers/PDF/ppdp1003.pdf 11, 12

INTEREST OF AMICI CURIAE[1]

Founded in 1971, amicus curiae Public Citizen, Inc., is a nonprofit consumer advocacy organization that appears on behalf of its nationwide members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has long played a role in the development of commercial-speech doctrine. Public Citizen has defended commercial-speech regulations in cases where those regulations were important to protecting public health or served other important public interests, such as in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), and *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015). Its attorneys have also represented parties seeking to invalidate overbroad commercial-speech restraints that harmed competition and injured consumers, including in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

Consumers Union is the policy and mobilization arm of Consumer Reports, an independent, nonprofit organization that works side by side with consumers to create a fairer, safer, and healthier world. As the world's largest independent product-testing organization, Consumer Reports uses its more than 50 labs, auto test center, and survey research center to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

subscribers to its magazine, website, and other publications. Consumers Union has been active over the years in numerous policy issues affecting consumer rights in the marketplace, including credit card fees and credit card surcharge bans.

National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969 at Boston College School of Law, NCLC has been a resource center addressing issues such as illicit contract terms and charges, home improvement frauds, debt collection abuses, and fuel assistance benefit programs. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series, and members of its staff have served on the Federal Reserve System Consumer-Industry Advisory Committee and committees of the National Conference of Commissioners on Uniform State Laws, and acted as the Federal Trade Commission's designated consumer representative in promulgating important consumer-protection regulations.

The Campaign for Tobacco-Free Kids (CTFK) is a tax-exempt nonprofit corporation under section 501(c)(3) of the Internal Revenue Code, organized under the laws of the District of Columbia. CTFK works to reduce tobacco use and its deadly toll in the United States and around the world. CTFK engages in public education about the dangers of cigarettes, as well as advocating public policies and sponsoring activities to prevent kids from smoking, help smokers quit and protect everyone from secondhand smoke. CTFK has frequently participated as an amicus curiae in defense of the validity of state, local,

and federal regulations against attacks based on allegations that such regulations unconstitutionally infringe commercial speech, and it has a strong interest in ensuring that the ability of state, local and federal governmental agencies to protect the public health by appropriate regulation of the tobacco industry is not weakened.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief because petitioners' arguments that New York's ban on the imposition of credit card surcharges is a restriction on commercial speech that violates the First Amendment, if accepted, would create new and serious barriers to regulation in the interest of consumers. Petitioners' argument is but one example of the increasing use of First Amendment arguments as tools to challenge economic and regulatory policies that pose no real burden on expressive interests and that, to the extent they implicate speech at all, involve only commercial speech. The misuse of the First Amendment to undermine types of government activity that, since the *Lochner* era, have appropriately been subject to very limited scrutiny has two argumentative strands: first, the characterization of a regulation of commercial conduct as a restriction on speech; and second, the attempt to subject regulation of commercial speech to the strict scrutiny that has until now been reserved for laws affecting fully protected, non-commercial speech.

This case implicates both concerns. First, petitioners' argument that New York's surcharge prohibition is a speech regulation erases the line between protected speech and commercial conduct, and would

advance the creep of First Amendment analysis into the sphere of economic regulatory activity that is properly subject to only the most deferential judicial review. Second, petitioners' request that the Court treat the statute as a "content-based" speech restriction, together with the explicit argument of some of their amici that all such restrictions should be subject to strict scrutiny, threatens decades of this Court's precedents giving only limited protection to commercial speech against government regulation in the public interest. We therefore submit this brief to explain that the statute is not a speech restriction subject to First Amendment scrutiny, and to urge the Court to reject application of strict scrutiny to the statute even should the Court conclude that it does restrict speech.

Our arguments are not based on our views regarding the policies underlying New York's no-surcharge statute. This brief takes no position on whether the statute reflects sound policy. One of the amici joining this brief, Consumers Union, actively opposed such a ban when it was proposed in California, and might very well oppose such a ban again, on policy grounds, if the opportunity should arise as a result of a new proposal to enact or repeal a surcharge ban. Amici Public Citizen, NCLC, and CTFK have not taken formal positions on such statutes. All the organizations, however, are sensitive to concerns that bans on surcharges may perpetuate subsidization of credit-card users by cash purchasers and reduce economic incentives for card issuers and networks to reduce swipe fees. These policy concerns about New York's law are cogently expressed by a

number of petitioners' amici.[2] Such policy concerns, however, are properly matters for legislative judgment, not constitutional adjudication.

ARGUMENT

I. Prohibiting imposition of surcharges on credit-card users regulates conduct, not speech.

A. Imposing higher prices on particular purchasers is commercial conduct.

The statute challenged in this case provides succinctly that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. L. § 518. On its face, the provision is not, as petitioners characterize it, a "speech code." Pet. Br. 5. Nor is it, as one of petitioners' amici characterizes it, a speech restriction "disguised as a mere business regulation."[3] Rather, the statute is what it appears to be: a prohibition on imposing an additional charge on cardholders at the register when a seller has stated a standard price for an item.

As the Second Circuit explained, insofar as the statute might be applied to the conduct of petitioners, it provides that if a seller identifies only a single price for a product (what the court referred to as a

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[2] *See, e.g.*, Br. for Consumer Action & Nat'l Ass'n of Consumer Advocates as Amici Curiae in Support of Pet'rs; Br. of Amicus Curiae U.S. Pub. Interest Research Group Educ. Fund, Inc. in Support of Pet'rs (U.S. PIRG Br.).

[3] Br. of Amici Curiae First Amdmt. Scholars & First Amdmt. Lawyers Ass'n in Support of Pet'rs 4.

"single-sticker price"), the seller may not "charg[e] credit-card customers an additional amount above its sticker price that it is not charging to cash customers." Pet. App. 21a. Thus, the statute functions as a regulation of the pricing of goods and services, not as a regulation of speech.

Petitioners and their supporting amici do not appear to dispute the precedents holding that charging a price to a customer is commercial conduct, and that regulation of such conduct is subject only to the extremely limited judicial review generally applicable to economic regulation. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504–08 (1996) (plurality opinion); *Munn v. Illinois*, 94 U.S. 113, 125 (1876). As the First Circuit has put it, "price regulations and other forms of direct economic regulation do not implicate First Amendment concerns." *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 77 (1st Cir. 2013).

Regulation of prices does not implicate the First Amendment even though charging a price typically involves a communication to the buyer of the price being charged. As this Court has explained, "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct," and the "First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Thus, preventing a merchant from charging a credit-card holder $103 for an item marked $100 does not itself have any cognizable First Amendment impact, notwithstanding that it might also, incidentally, prevent the merchant from telling the consumer that she will be charged $103. In the

Second Circuit's words, "prices, although necessarily communicated through language, do not rank as 'speech' within the meaning of the First Amendment." Pet. App. 19a.

The United States argues that a law requiring merchants who post a single price to charge credit-card purchasers no more than that price should be treated as a regulation of speech because the requirement "addresses the *communication* of an otherwise-permissible pricing scheme rather than the pricing scheme *itself*." U.S. Br. 19. But the New York statute does not address communication any more than any price regulation inherently affects the communication of the price being charged. The United States' argument implies, for example, that a law prohibiting merchants from charging *any* purchaser more than a product's posted price would be a speech regulation on the theory that, had the merchant communicated a different price, it could lawfully have charged it. If accepted, the argument could even suggest that prohibitions on price-fixing are speech regulations because they address communications that affected the prices charged.

The consequences of the United States' position thus contradict the United States' proper recognition that "the government may attach legal consequences to speech without triggering First Amendment concerns." U.S. Br. 18. As the government acknowledges, contract law principles that prevent a person from charging more than the price stated in a contract are enforceable, although the higher price would have been lawful if it had been communicated in the contract. U.S. Br. 18. Just as "[a] law that simply requires a merchant to honor particular representations *if he chooses to make them* is properly

viewed as regulating economic conduct rather than speech," *id.*, a law that requires a merchant to honor standard posted prices *if he chooses to post them* regulates economic conduct, not speech.

B. The New York statute addresses prices, not semantics.

Offering a different argument from that of the United States, petitioners assert that because the New York law does not prohibit merchants from offering *discounts* from standard prices to those who use forms of payment other than credit cards, the distinction it draws between what is lawful and what is unlawful is purely semantic. In other words, petitioners contend that, because the price consequence of a 3 percent credit card surcharge on a product priced at $100 is the same as that of a 2.9 percent cash discount on a product priced at $103—either way, a cash purchaser gets the product for $100 and a credit-card customer pays $103—the law is really regulating the way merchants describe their pricing, not regulating their conduct.

As the Second Circuit pointed out, however, the law does not turn on how merchants characterize their charges, but on whether they charge credit-card customers a higher price than a posted standard price:

> What Section 518 regulates—all that it regulates—is the difference between a seller's sticker price and the ultimate price that it charges to credit-card customers. A seller imposing a surcharge (an additional amount above its sticker price) on credit-card customers could choose to "characterize" that additional charge as whatever it wants, but that would not change the fact

> that it would be violating Section 518. Conversely, a seller offering a discount (a reduction from its sticker price) to cash customers could choose to "characterize" that reduction as whatever it wants (including as a "credit-card surcharge"), but that would not change the fact that the seller would *not* be violating Section 518.

Pet. App. 21a–22a.

In short, charging a customer *more* than a posted price is different conduct from charging her *less* than that price. Although the distinction between saying "I am charging you more than I am charging him" and saying "I am charging him less than I am charging you" may be semantic, the difference between charging someone a higher price than the one posted and charging someone a lower price than the one posted is not. Those two distinct forms of conduct also have different names—surcharges and discounts—but, as the Second Circuit noted, "the fact that these pricing schemes *have* different labels (and thus that sellers are likely to refer to them using different words) obviously does not mean that *all they are* is labels." Pet. App. 22a. The statute's application depends on a merchant's pricing conduct, not on how the merchant labels, characterizes, or explains it.

Accordingly, the statute is not like the commercial-speech restrictions that this Court has found to violate the First Amendment. It does not function by depriving customers of information. It does not prevent merchants from telling customers that their posted prices build in the costs of credit card usage or that customers are "*already* effectively paying sur-

charges in the form of higher base prices."[4] Nor does the statute prohibit merchants who discount their standard prices for non-credit purchasers (or employ "dual-pricing" systems involving separately marked cash and credit prices) from stating factually that credit-card users will pay more than cash purchasers, or from explaining the reasons for the differentials. A statute that prohibited such speech would properly be subject to review as a restriction on commercial speech. The New York statute, however, only prohibits merchants from *charging* credit-card purchasers prices that exceed stated standard prices. That prohibition does not implicate First Amendment concerns.

C. The statute reflects economic regulatory policies that, whether wise or misguided, are subject to rational-basis review.

1. Many of the arguments against surcharge prohibitions rest on theories that, because of consumers' cognitive biases, surcharges may have more impact than discounts on consumer choices—and therefore on the incentives of merchants to offer different cash and credit prices, and ultimately on incentives for card issuers to cut swipe fees. That the impact of pricing behavior is mediated through consumers' cognitive biases, however, does not transform regulation of merchants' pricing *conduct* into regulation of speech. The different effects that petitioners and their amici ascribe to discounts and surcharges are not the result of limitations on what merchants may tell consumers about the consequences of credit-card fees; rather, those effects ap-

[4] U.S. PIRG Br. 8.

pear to be attributable to consumers valuing discounts less than they resent paying surcharges.[5]

That phenomenon is one of many that policymakers are entitled to consider in regulating commercial practices respecting credit card fees. Whether banning surcharges is good or bad public policy depends on judgments both about policy goals and about the likely effects of various policy options on consumer choices and merchant incentives. Legislators might choose, for example, to seek to reduce subsidization of credit-card users by cash purchasers; to deter (or encourage) credit-card use; to provide customers with motivation to push back against high swipe fees charged by card issuers and networks; and/or to enable consumers to engage in comparison shopping among cards with different swipe fees. Whether and to what extent particular policies, such as permitting surcharges, would achieve those goals might depend on how likely it was that merchants would risk the displeasure of card-using customers by instituting surcharges, whether surcharges would actually reduce prices paid by cash purchasers, and whether further regulation might be required to prevent excessive surcharges.[6]

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[5] See, e.g., Br. of Amicus Curiae Prof. Adam J. Levitin in Support of Pet'rs; Br. of Scholars of Behavioral Econ. as Amici Curiae in Support of Pet'rs.

[6] Some of the competing considerations are discussed in Fumiko Hayashi, *Discounts and Surcharges: Implications for Consumer Payment Choice*, Fed. Reserve Bank of Kan. City (June 2012), https://www.kansascityfed.org/publicat/psr/briefings/psr-briefingjune2012.pdf; Scott Schuh, Oz Shy & Joanna Stavins, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, Fed. Reserve Bank of Boston

(*Footnote continued*)

Such judgments about ends and means are appropriately within the province of legislatures, not courts. Choices of this nature, concerning the impacts of regulations of pricing and other commercial practices, are quintessentially matters of economic policy, having nothing to do with regulating speech. One need not endorse the choice New York has made to recognize that such choices should not be made by courts as an imperative of constitutional adjudication.

2. In the *Lochner* era, this Court struck down a number of economic regulatory measures as violative of broad notions of economic liberty. *See Lochner v. New York*, 198 U.S. 45 (1905). But in the modern era, in the 80 years since *Lochner*'s demise, this Court has strongly adhered to the principle that where regulations of economic activity are concerned, courts are "both incompetent and unauthorized" to second-guess "the wisdom of the policy adopted, [and] the adequacy or practicability of the law enacted to forward it." *W. Coast Hotel Corp. v. Parrish*, 300 U.S. 379, 398 (1937) (citation omitted).

This principle of judicial restraint quickly found expression in an appropriately deferential standard for evaluating the constitutionality of economic regulatory laws: "[R]egulatory legislation affecting ordinary commercial transactions is not to be pro-

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(Aug. 2010), https://www.bostonfed.org/-/media/Documents/Workingpapers/PDF/ppdp1003.pdf; Allen Rosenfield, *Point-of-Purchase Bank Card Surcharges: The Economic Impact on Consumers*, New America Found. (May 2010), https://na-production.s3.amazonaws.com/documents/point-of-purchase-bank-card-surcharges.

nounced unconstitutional unless ... it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). Under the rational-basis standard, courts may not "strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955). Even a statute that a court may view as "needless" and "wasteful" must be upheld if a legislature "might [have] thought" that it was "a rational way" to pursue some legitimate goal. *Id.* at 487–88.

The Court has repeatedly adhered to the view that review of economic regulatory measures under the rational-basis test "is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Dandridge v. Williams*, 397 U.S. 471, 486 (1970). Moreover, "States are not required to convince the courts of the correctness of their legislative judgments." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). Rather, "this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations," and accords States "wide latitude in the regulation of their local economies." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *accord, e.g., FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15 (1993); *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174–79 (1980).

These limits on judicial review of economic regulation reflect recognition that the Constitution generally does not address matters of substantive economic policy, *see Ferguson v. Skrupa*, 372 U.S. 726, 731–32 (1963), as well as adherence to the boundaries between the institutional competencies of courts and legislatures. The deferential review of economic regulatory laws both preserves legislatures' "rightful independence" and "ability to function," *Beach Commc'ns*, 508 U.S. at 315 (citation omitted), and denies to the courts the unchecked authority of a "superlegislature." *Dukes*, 427 U.S. at 303. Adherence to those boundaries is an essential hallmark of the important but not unlimited role of courts in our democratic system.

Of course, when laws regulating economic activities employ suspect classifications or impinge on fundamental rights, rational-basis review gives way. *See Carolene Prods.*, 304 U.S. at 152 n.4. But calling a regulation of commerce a speech regulation does not make the "speech" label valid. As discussed above, the law at issue here regulates what merchants "must *do* ..., not what they may or may not *say*." *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 60 (2006). The Court should not lightly treat regulations of commercial conduct as regulations of commercial speech. Doing so threatens to erode the integrity of legislative authority and to entangle the courts in judgments about economic policy that they are ill-equipped to form and lack legitimate authority to make.

Petitioners assert that "[t]his case in no way threatens the bedrock proposition that states have broad authority to regulate economic conduct, unencumbered by the First Amendment," Pet. Br. 35, be-

cause the Court's decision will, they say, directly affect only a handful of credit-card surcharge laws. But the precedential impact of treating this regulation of commercial conduct—the imposition of a charge—as a regulation of speech would have far-reaching and potentially destabilizing effects on our democratic system, well beyond the particular facts of this case.

II. If the Court decides First Amendment scrutiny is warranted in this case, the Court should apply its precedents concerning regulation of commercial speech.

As explained above, the New York statute does not regulate speech in any respect that implicates the First Amendment. But no party disputes that, to whatever extent the New York law might be deemed to implicate speech, the speech is nothing more than what this Court has described as "commercial speech" in a line of cases now dating back 40 years. The only "speech" that petitioners claim has been "regulated" here is speech stating the prices at which their goods and services are offered for sale to the public. Such speech falls squarely within the definition of commercial speech. *See 44 Liquormart,* 517 U.S. 484.

This Court first extended First Amendment protection to commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 762. Since then, the Court has repeatedly held that commercial speech receives less protection against regulation than noncommercial speech. Restrictions of commercial speech, even if content-based, are subject not to the strict scrutiny ordinarily applied to content-based restrictions on fully protected speech, but to a lesser, intermediate

scrutiny. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980). Moreover, disclosure requirements applicable to commercial messages are subject to an even more lenient standard of review, akin to the rational-basis test applicable to commercial regulation generally. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

Here, petitioners not only argue that New York's statute regulates speech and not conduct, but also hint that because it is in their view a content- and viewpoint-based regulation, Pet. Br. 33, it might be subject to strict scrutiny. *see* Pet. Br. 36. They argue, however, that the Court can strike down the law without applying such scrutiny because the law cannot survive "even" the intermediate scrutiny the Court has long used to evaluate restrictions on commercial speech under *Central Hudson*. *Id.*

Some of petitioners' amici do not pull their punches: They expressly call on the Court to use this case to dispense with *Central Hudson*'s intermediate scrutiny and impose strict scrutiny on all "content-based" commercial-speech regulations—that is, *all* commercial-speech regulations.[7] Should this Court determine that the statute is subject to any form of First Amendment analysis, it should reject the suggestion that strict scrutiny should apply and review the statute under the firmly grounded principles it has previously applied to commercial speech regulations in such cases as *Central Hudson* and *Zauderer*.

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[7] *See, e.g.*, Br. for Amici Curiae Ahold U.S.A., Inc., *et al.*, in Support of Pet'rs; Br. of Amici Curiae Cato Inst. & Pac. Legal Found. in Support of Pet'rs.

A. To the extent the statute merely regulates disclosure of differential cash and credit-card pricing, it may be subject only to *Zauderer*'s rational-basis standard.

Having concluded that the New York law regulates speech, petitioners and their supporting amici jump directly to assessing it under standards of review applicable to prohibitions on speech. As the United States points out, however, U.S. Br. 14, 21–23, commercial-speech regulations that impose only disclosure requirements rather than prohibitions on speech are subject to a form of review considerably more deferential even than *Central Hudson*'s intermediate scrutiny: *Zauderer*'s rational-relationship standard. *See* 471 U.S. at 651.

Thus, before addressing whether some heightened form of scrutiny applies, this Court—if it were to accept the assertion that the statute regulates speech at all—should first consider the nature of the regulation involved here. The Second Circuit did not delve into that question, because it determined that the statute regulates conduct and not speech, and that issues about the statute's possible application to dual-pricing structures were not properly before the court. If this Court accepts the contention that the statute implicates the First Amendment, however, it cannot avoid addressing the nature of any regulation of speech that the statute imposes. As the United States points out, if the statute does regulate speech, the proper First Amendment analysis hinges on whether it merely requires that price differentials for cash and credit transactions be disclosed in particular ways (as the United States says was the case with the former federal statutory prohibition on surcharges, which the United States argues was con-

sistent with the First Amendment), or whether it actually imposes prohibitions on the way merchants may characterize their prices. U.S. Br 14–15, 23–35. If the statute merely regulates disclosure of price differentials, the proper First Amendment analysis would be the *Zauderer* standard.

Zauderer rests on a fundamental principle governing First Amendment review of commercial-speech regulations: The constitutionally protected interests implicated by commercial-speech regulations that involve disclosure are much less substantial than those implicated by prohibitions on commercial speech. Thus, while prohibitions on commercial speech are subject to a form of "heightened scrutiny"—under the intermediate scrutiny framework articulated in *Central Hudson*—commercial disclosure requirements are subject to rational-basis review, under which they are sustained if they are "reasonably related" to a legitimate government interest. *Zauderer*, 471 U.S. at 651.

This Court explained in *Zauderer* that this difference in standards of review rests on "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. *Zauderer* recognized that, outside the realm of commercial speech, laws compelling individuals to profess views on "'politics, nationalism, religion, or other matters of opinion'" raise the most fundamental First Amendment concerns. *Id.* at 651 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). But when commercial speakers are required to disclose information about their products or businesses, "the interests at stake ... are not of the same order." *Id.* "Because the extension of First Amendment protection to commercial speech is justified principally by

the value to consumers of the information such speech provides, [a commercial speaker's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.*

Disclosure requirements are a preferred form of regulating commercial speech precisely because they "trench much more narrowly on an advertiser's interests than do flat prohibitions on speech." *Id.* These considerations led the Court in *Zauderer* to hold heightened scrutiny in any form inapplicable to requirements of factual disclosures in advertising, and to limit its review to the most deferential level of constitutional scrutiny. *Id.*

In *Zauderer*, and in the Court's later decision in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), the legitimate interest that sufficed to justify regulating disclosure was the "interest in preventing deception of consumers." *Id.* at 253; *Zauderer*, 471 U.S. at 651. But *Zauderer* did not limit its holding to cases where the government interest is related to protecting consumers against deception. The Court determined rational basis to be the appropriate level of review because commercial speakers have only a very minimal constitutionally protected interest in not disclosing factual information about their products, services or businesses. *Zauderer*'s reasoning thus suggests that it applies more broadly, and that whenever a law "requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech[.]" *44 Liquormart*, 517 U.S. at 501 (plurality).

Application of *Zauderer* necessitates analysis of what form of disclosure the statute requires and whether that disclosure could be viewed as rationally related to some government interest in protecting consumers. Because the Second Circuit did not perform such an analysis, and additional evidence may be required to make the proper determination, a remand is appropriate, as the United States recommends, if the potential problem with the statute relates to disclosure requirements.

B. If deemed a commercial-speech prohibition, the no-surcharge statute would be subject to intermediate scrutiny.

Whether analyzed as a regulation of commercial conduct or as a regulation of the manner in which prices are disclosed, New York's surcharge prohibition is subject only to minimal, rational-basis judicial scrutiny. But even if the Court were to accept petitioners' assertion that prohibiting surcharges is properly viewed as prohibiting commercial speech about price differentials, the New York law would be subject only to intermediate scrutiny.

1. This Court has long applied intermediate scrutiny to content-based commercial-speech regulations.

The First Amendment standard that applies to restrictions on commercial speech is firmly established: The government may restrict such speech where it has "substantial" interests in the regulation, the regulation "advances these interests in a direct and material way," and "the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (citing *Cent. Hudson*, 447 U.S. at 564).

This standard affords less protection for commercial speech than the strict scrutiny ordinarily applicable to fully protected speech, such as political, literary, artistic or religious expression. This "common-sense distinction" between commercial and noncommercial speech stems from commercial speech's "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978) (internal quotation marks omitted).

Certain of petitioners' amici contend that the New York statute restricts the "content" of a merchant's speech about prices, and that the Court therefore should apply the strict scrutiny normally applicable to content-based restrictions on fully protected speech. Those amici argue that content-based restrictions on commercial speech should be treated the same as content-based restrictions on speech about religious or political views. But as this Court's decisions recognize, "regulation of commercial speech based on content is less problematic" than content-based regulation of noncommercial speech. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983). The Court has explained that "regulation of [commercial speech's] content" is permissible in part because such "speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" *Cent. Hudson*, 447 U.S. at 564 n.6 (citation omitted).

The argument for strict scrutiny of content-based commercial-speech regulations also runs counter to a long line of cases in which this Court has consistently applied intermediate scrutiny to restrictions on the content of lawful, non-misleading commercial speech. *See, e.g., Greater New Orleans Broad. Ass'n,*

Inc. v. United States, 527 U.S. 173, 176, 183–84 (1999) (striking down a statute that forbade broadcast advertising of casino gambling, as applied to advertisements in jurisdictions where such gambling was legal); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478, 482, 488 (1995) (invalidating federal law that prohibited beer labels from displaying alcohol content); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620, 635 (1995) (upholding rule prohibiting attorneys from sending certain written solicitations to accident or disaster victims); *Bolger*, 463 U.S. at 61, 68–69 (holding unconstitutional as applied a statute that prohibited unsolicited advertisements for contraceptives); *In re R.M.J.*, 455 U.S. 191, 194, 205–07 (1982) (holding unconstitutional a rule that barred attorney advertisements from identifying jurisdictions in which attorneys were licensed). In each case, the restrictions turned on the "subject matter" of the speech and the identity of the speaker. Yet in each case, the Court held that the restrictions were subject only to intermediate scrutiny.

Indeed, *Central Hudson* itself struck down a regulation that banned all "advertising intended to stimulate the purchase of utility services," an overtly content- and viewpoint-based restriction. *Cent. Hudson*, 447 U.S. at 559 (internal quotation marks omitted). Thus, the argument for strict scrutiny of content-based commercial-speech restrictions posits that the Court applied the wrong standard in the very case that gave First Amendment intermediate scrutiny its name.

2. *Sorrell* and *Reed* do not alter the intermediate scrutiny standard for restrictions on commercial speech.

The argument for strict scrutiny hinges on this Court's recent decisions in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *Sorrell v. IMS Health*, 564 U.S. 552. Those decisions, however, do not step back from the Court's well-established distinction between commercial and noncommercial speech, even for restrictions that are content-based.

In *Sorrell*, the Court struck down on First Amendment grounds a Vermont law that prohibited, with limited exceptions, "pharmacies, health insurers, and similar entities from disclosing or otherwise allowing prescriber-identifying information to be used for marketing" and "pharmaceutical manufacturers and detailers from using the information for marketing." *Id.* at 563. The Court held that the law imposed a "speaker- and content-based burden on protected expression," *id.* at 571, by allowing the use of information by other entities, such as "private or academic researchers," and for non-marketing purposes, such as "educational communications." *Id.* at 563–64. The Court therefore concluded that "heightened judicial scrutiny is warranted." *Id.* at 565.

Importantly, however, the Court went on to reaffirm that there are two forms of "heightened" scrutiny that may apply to content-based speech restrictions: "a special commercial speech inquiry or a stricter form of judicial scrutiny" for noncommercial speech. *Id.* at 571. The Court concluded that it was unnecessary to decide whether the speech at issue was commercial or noncommercial because, even under the less stringent "commercial speech inquiry,"

the law was unconstitutional. *See id.* at 571–72 (citing *Cent. Hudson*, 447 U.S. at 566). Far from announcing a new rule, *Sorrell*'s repeated distinction between the review standard for commercial speech and the "stricter" standard for noncommercial speech supports the continued application of intermediate scrutiny to commercial speech.

As the *Sorrell* opinion makes clear, the phrase "heightened scrutiny" does not refer to strict scrutiny. *Sorrell*'s application of intermediate scrutiny contradicts any such reading, and many of the Court's other opinions demonstrate that "heightened scrutiny" is a *generic* term indicating a level of scrutiny higher than rational-basis scrutiny, including both intermediate scrutiny and strict scrutiny. For example, the Court's equal protection precedents frequently use the term "heightened scrutiny" to describe the intermediate scrutiny applicable to gender classifications. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533, 555 (1996); *Clark v. Jeter*, 486 U.S. 456, 463, 465 (1988). In the First Amendment area, the Court has likewise referred to the intermediate scrutiny applied to limits on political contributions as a form of "heightened judicial scrutiny." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). The Court's opinion in *Sorrell* uses the term "heightened scrutiny" in the same way—as a general description of scrutiny beyond a rational-basis test—not as another way of saying strict scrutiny.

Nor does *Reed* offer any support for application of strict scrutiny to commercial-speech regulations. *Reed* struck down a local law that prohibited outdoor signs without a permit but exempted twenty-three categories of signs, including political and ideological signs and temporary directional signs of short dura-

tion. *See* 135 S. Ct. at 2224–25. The law did not, however, exempt signs that the plaintiffs—a church and its pastor—sought to display for more extended periods to publicize the time and location of upcoming church services. *Id.* at 2225. The Court cited noncommercial-speech cases for the proposition that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226. The Court cited *Sorrell*, a commercial-speech case, only in defining the "commonsense meaning of the phrase 'content based.'" *Id.* at 2227. The Court explained that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* (citing *Sorrell*, 564 U.S. at 565). The Court thus found that the town ordinance in *Reed* was content-based because it "single[d] out specific subject matter for differential treatment." *Id.* at 2230. The Court then applied strict scrutiny to the ordinance as a content-based regulation of noncommercial speech. *Id.* at 2231.

Critically, *Reed* did not hold—or even discuss the possibility—that strict scrutiny would apply to content-based *commercial-speech* restrictions. Surely if the Court intended to overrule its many decisions distinguishing commercial speech from noncommercial speech, its opinion would have acknowledged such a momentous decision. *Reed* does not do so. Indeed, the Court's opinion does not use the term "commercial speech" even once.

Likewise, to the extent that New York's law might be viewed as regulating the way differences in

cash and credit prices are disclosed, *see supra* at 17–20, neither *Reed* nor *Sorrell* suggests retreat from *Zauderer*'s standard of review for content-based commercial-speech disclosure requirements. Neither case involved disclosure requirements, and neither opinion mentions *Zauderer*, let alone alters the standard of review for disclosure requirements. *Sorrell* and *Reed* plainly did not silently overrule *Zauderer*.

3. Applying strict scrutiny to content-based commercial-speech regulations is neither necessary nor proper.

The view that content- or speaker-based commercial-speech restrictions are subject to strict scrutiny would have exceptionally far-reaching implications, because commercial-speech restrictions are always, or virtually always, content- or speaker-based in the broad, general sense in which the Court has used the term in *Reed* and *Sorrell*. Commercial-speech restrictions, by definition, apply to commercial messages and commercial speakers, and usually to particular types of speakers and messages (for example, the written solicitations from attorneys that were at issue in *Went for It*, *see* 515 U.S. at 620). More broadly, "the classification of speech between commercial and noncommercial is itself a content-based distinction." *CTIA—The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061 n.9 (N.D. Cal. 2015), *app. filed*, No. 16-15141 (9th Cir. Feb. 1, 2016). As one scholar has observed, "this argument, that a statute which treats marketing differently than other speech, is constitutionally infirm *on that ground*, makes a hash of the commercial-speech doctrine because, by definition, the commercial-speech doctrine is applicable only to a specific type of content—

commercial content." Tamara Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. Bus. & Tech. L. 1, 20 (2016).

Similarly, commercial-speech disclosure requirements are necessarily content- and speaker-based in the broad, general sense in which petitioners and their amici use those terms. That is, they are triggered by advertisements or other commercial speech with specific content, made by particular types of speakers. In *Zauderer*, for example, the disclosure requirement applied only to particular speakers (attorneys) and only to speech with particular content (advertisements mentioning contingent-fee representation). *See* 471 U.S. at 650. Such content- and speaker-specificity is an inherent feature of commercial-speech disclosure requirements: It would make no sense, for example, to require companies advertising shoes to warn that smoking cigarettes causes cancer. Likewise, cigarette companies are not required to include warnings about the dangers of sugary drinks in their advertisements, and soft-drink advertisements need not disclose EPA-estimated miles-per-gallon figures for cars. Thus, if content- and speaker-based commercial disclosure requirements were subject to heightened scrutiny, all disclosure requirements would have to face such scrutiny, and *Zauderer* would be a dead letter.

a. Applying strict scrutiny to commercial speech would threaten a broad range of commonsense regulations.

Applying strict scrutiny to content-based commercial-speech restrictions—in addition to making a mess of the case law—would risk devastating consequences for the government's ability to adopt com-

monsense marketplace regulations. Regulations of commercial speech typically apply to specific market participants, such as food manufacturers, debt collectors, or drug companies, and they deal with problems unique to industries in which those participants operate. For example, federal law limits the circumstances in which food manufacturers can make claims about health benefits of their products, 21 C.F.R. § 101.14, or advertise the addition of vitamins to infant formula, *id.* § 107.10(b). It forbids debt collectors from advertising the sale of a debt to coerce a debtor to pay it, and from publishing lists of consumers who refuse to pay debts. 15 U.S.C. § 1692d(3)–(4). If content-based commercial-speech restrictions are subject to strict scrutiny, all these restrictions might have to satisfy such scrutiny, on the theory that they apply "to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227.

In the disclosure context, too, the government frequently mandates speech on a particular subject and requires that commercial actors use specific language. For example, vehicle manufacturers must label, in accordance with Environmental Protection Agency rules, each vehicle with its average miles per gallon of fuel. 49 U.S.C. § 32908(b). Drug manufacturers must include "black box" warnings on labels of certain drugs to emphasize particular hazards. 21 C.F.R. § 201.57. And food manufacturers must disclose nutritional information about their products. *Id.* § 101.9.

The government would have a much higher burden to justify basic rules like these if they were subjected to strict scrutiny. It "is the rare case" in which the government "demonstrates that a speech re-

striction is narrowly tailored to serve a compelling interest," as required to satisfy strict scrutiny. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015) (citation omitted). Indeed, in the noncommercial-speech context, the Court has described content-based restrictions as "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Applying strict scrutiny to content-based commercial-speech restrictions could obliterate many laws and regulations that are longstanding and critical to the protection of consumers. The crippling effects would be even more far-reaching if the notion of what is "content-based" were conceived as broadly as petitioners and their amici propose.

b. Applying strict scrutiny to commercial speech would harm protection of pure speech and is unnecessary to protect commercial speech.

Applying strict scrutiny to content-based commercial-speech restrictions could also unnecessarily create unintended, harmful consequences for the protection of religious, political, literary, artistic and other noncommercial speech at the heart of the First Amendment. "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U.S. at 456. That is, if strict scrutiny were applied to commercial-speech regulations—including fundamental protections on which the public has depended for decades—the inclination of courts to uphold sensible marketplace rules might lead them to relax strict First Amendment scrutiny as we know it, to the detriment of speakers engaged

in the kinds of fully protected expression that undergird American liberty and democracy.

That result would be all the more unfortunate because application of strict scrutiny is not necessary to curb any actual government excesses in the realm of commercial speech. *Central Hudson* intermediate scrutiny is already quite protective, perhaps in some cases overly protective, of commercial-speech interests. For example, in this case, assuming that the statute were deemed to prohibit speech, it could be sustained under *Central Hudson* only if the interests identified by the state are not only legitimate, but also "substantial," and if the statute advances them "directly" and in a "reasonabl[y] proportion[ate]" way. *Edenfield*, 507 U.S. at 767. As demonstrated by petitioners' brief, and that of a number of its other amici who do not advocate strict scrutiny,[8] the prohibition on surcharges may be difficult to support if it must survive any degree of heightened scrutiny. Thus, should the Court conclude that the New York statute imposes commercial-speech prohibitions, it should expressly reaffirm that the *Central Hudson* test is the appropriate standard of review for such restrictions, and should assess the law under that test.

CONCLUSION

Whatever the merits of New York's ban on credit surcharges as a matter of policy—and they are dubious—the Second Circuit correctly concluded that the ban regulates commercial conduct, not speech. Because petitioners make no claim that the law lacks

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[8] *See, e.g.*, U.S. PIRG Br.

the rational basis required to sustain an economic regulatory measure, the Second Circuit's judgment should be affirmed.

If the Court nonetheless concludes that the statute does regulate speech in some cognizable fashion, it should assess the statute under *Zauderer*'s rational-relationship standard to the extent the statute merely regulates disclosure—or should remand for consideration of that issue.

Finally, if the Court were to conclude that the statute actually embodies some prohibition on protected commercial speech, it should hold that the statute is subject to review under *Central Hudson*'s intermediate scrutiny standard.

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IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, et al.

Petitioners,

v.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF NEW YORK, et al.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, RETAIL COUNCIL OF NEW YORK STATE, FLORIDA RETAIL FEDERATION, AND FOOD MARKETING INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The assembled amici are trade groups representing retail merchants, including both the largest national stores and small, local retailers from states that have passed surcharge bans. Each amicus is described individually below, but they share a common interest in protecting merchants' First Amendment right to communicate effectively with consumers about the costs that contribute to the prices they pay. Through a wealth of experience, these retailers know that their customers are highly interested in cost avoidance, and that convincing them to change their choices happens most powerfully through well-considered decisions about how to frame and communicate the various pricing options that a consumer confronts in deciding what to buy and how to buy it. Amici ask the Court to reaffirm that such merchant decisions are protected speech because the "free flow of commercial information is indispensable .... to the proper allocation of resources in a free enterprise system ... [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Va. Bd. of Pharm. v. Va. Consumer Council*, 425 U.S. 748, 765 (1976). As it turns out, merchants may be unlikely to embrace credit-card surcharges as a matter of choice. But a matter of choice is what it should be, because laws that forbid truthful and non-misleading communication about pricing skew public perceptions of both commerce and policy in violation of the First Amendment.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, other than *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

Retail Litigation Center: The Retail Litigation Center, Inc. is a public policy organization representing national and regional retailers in the United States. Its members include many of the country's largest and most innovative retailers, employing millions of people throughout the United States and accounting for tens of billions of dollars in annual sales. The RLC identifies and engages in legal proceedings that have a national impact on the retail industry. It seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the industry-wide consequences of significant pending cases.

Retail Council of New York State: The Retail Council of New York State was incorporated in 1931 by a group of retailers looking to combine their interests and leverage their strengths to better support their businesses. Today, the Council is New York's largest full-service, statewide retail trade association. Headquartered in Albany, the Council serves the needs of merchants, professionals and other providers of goods and services across the state. Members range in size from sole proprietor businesses to national retail chains.

Florida Retail Federation: The Florida Retail Federation (FRF), is a not-for-profit 501(c)(6) Florida corporation and trade association representing the mutual interests of retail related businesses. Florida retailers annually provide more than $25 billion in wages, one of every five jobs in the State, and collect and remit $19 billion dollars in sales and retail related taxes. The FRF consists of over 4000 retailers in the State of Florida.

The Georgia Retail Association (a division of the FRF) represents over 170 retail companies operating

in the State. Retail supports 1 out of 4 jobs in Georgia and is directly and indirectly responsible for 78% of Georgia's gross domestic product.

The Florida Petroleum Marketers and Convenience Store Association (also a division of the FRF) represents over 230 companies operating in the petroleum and convenience store industries in Florida. Its mission is to protect the industry and advocate on its behalf by striving to promote policies that favor economic and business growth.

Food Marketing Institute: The FMI proudly advocates on behalf of the food retail industry. FMI's U.S. members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost $770 billion. Through programs in public affairs, food safety, research, education and industry relations, FMI offers resources and provides valuable benefits to more than 1,225 food retail and wholesale member companies in the United States and around the world. FMI membership covers the spectrum of diverse venues where food is sold, including single owner grocery stores, large multi-store supermarket chains and mixed retail stores.

BACKGROUND

1. The fees that merchants pay to accept credit cards have a dramatic effect on both their bottom lines and the United States economy as a whole. These "swipe fees" are assessed as a percentage of every transaction conducted with a credit card; they are often two or three percentage points on each sale, and sometimes more for certain retail categories. For many merchants, swipe fees represent their highest cost of doing business after real estate, healthcare,

and payroll.[2] The banks and card companies that reap these fees make tens of billions of dollars each year in revenue from the system, even before one considers annual fees that they charge to cardholders, as well as interest, penalties, and other charges. *See generally* Adam Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1330, 1355 (2008); Terri Bradford & Fumiko Hayashi, Fed. Reserve Bank of Kansas City, *Developments in Interchange Fees in the United States and Abroad* (April 2008), https://www.kansascityfed.org/publicat/psr/briefings/%20psr-briefingApr08.pdf; 156 Cong. Rec. S4839 (June 10, 2010). It is an enormously profitable line of business—one that has only gotten more profitable over time, even as technology and returns to an ever-increasing scale have lowered the relevant costs of running a credit-card network.

One part of the reason the credit-card business is so profitable is no doubt the value of the product to purchasers and merchants; credit cards are very useful. But even valuable products should become less profitable over time. Basic economic theory holds that high profits should attract new entrants, and competition should drive down prices to purchasers—espe-

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[2] *See* Amex Tr. 386-87, 1222-23. Although it is supported by numerous underlying sources, much of the discussion below is cited to the trial record (Amex Tr.) and findings of the district court in the government's case against American Express. *See United States v. Am. Express Co.*, 88 F. Supp. 3d 143 (S.D.N.Y. 2015). While the Second Circuit has recently overturned that opinion on grounds related to market definition, *see United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016), the government has sought rehearing *en banc*, and the Second Circuit did not contest the factual findings relevant here.

cially where, as here, the costs of providing the product or service have remained the same or decreased. But that hasn't happened with the card networks; evidence from the antitrust case the U.S. Department of Justice recently brought against the card companies demonstrates that the card networks have been consistently *raising* their prices, and those price increases have landed in large part in the card companies' bottom lines. *See Am. Express*, 88 F. Supp. 3d at 195-98 ("[B]etween 2005 and 2010, American Express repeatedly and profitably raised its discount rates to millions of merchants across the United States as part of its Value Recapture initiative without losing a single large merchant and losing relatively few small merchants as a result.").

The problem is that there is little effective competition among the card companies, particularly when it comes to merchant swipe fees. Providing credit-card services to merchants is already a highly concentrated industry, there has been virtually no entry for decades, *id.* at 190, and the barriers to further entry are especially high. *See id.* at 189 (finding that this "market remains highly concentrated and constrained by high barriers to entry, just as it was in [*United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003)]"). There are only three players of serious consequence in the market—Visa, MasterCard, and American Express—and the only other company with a non-trivial role (Discover) has a market share below five percent. To be sure, there are a huge number of banks that offer credit cards to consumers through a whole host of credit-card products, but because they operate through the Visa and MasterCard networks, they do not compete at all over the prices charged to merchants to accept those cards. The highly concentrated,

non-competitive market that results is alone sufficient to lead to very high prices and what look (unsurprisingly) like monopoly profits in the charging of merchant swipe fees.

But that's not all. In the DOJ antitrust case described above, the United States (along with a large number of individual States) challenged a series of so-called "anti-steering rules" (ASRs) that the major card networks adopted in parallel, and that tend to further suppress competition among them. Visa and MasterCard abandoned these rules as a result of the Antitrust Division's suit, but American Express refused to do so, and the case went to trial. The government's evidence in that case showed that—even though each company adopted them individually and only American Express still imposes them—these anti-steering rules almost completely suppress interbrand competition among the card companies over merchant swipe fees, above and beyond the effect of high concentration in the industry. *See, e.g.*, *Am. Express*, 88 F. Supp. 3d at 207-08.

To make a long story short, Visa, MasterCard, and American Express have long forbidden merchants from engaging in *any* form of behavior that shows a preference for one form of payment over another when consumers get to the register: Merchants cannot, for example, offer consumers a discount for using less expensive forms of payment or even provide a special checkout lane for using cheaper alternatives to the highest-priced rewards cards. And while some of these rules have been abrogated by federal legislation and/or private antitrust settlements, American Express continues to generally prohibit merchants from steering customers to cheaper payment forms through its ASRs. Moreover, because contractual or settle-

ment terms continue to forbid merchants from treating one card company worse than any another, the American Express ASRs have the effect of broadly prohibiting merchants from steering to cheaper payment forms throughout the industry as a matter of contract.

According to the government's successful case (and in reality), the core problem created by the anti-steering rules is that they leave merchants with no way to encourage price competition among the card networks. *Id.* Merchants could theoretically try to resist such anti-competitive contract terms or negotiate for price breaks by threatening to drop any one of the major card companies, but experience has shown this to be impossible for most merchants in light of the competitive consequences of trying to go without customers who want to use Visa, MasterCard, or American Express.[3] (In other words, Visa, MasterCard, and American Express each have market power in their relationships with merchants). *See, e.g., Visa*, 344 F.3d at 239 ("We agree with the district court's finding that Visa U.S.A. and MasterCard, jointly and separately, have power within the market for network services."). Merchants' next best option is to try to encourage their customers to use cheaper cards at the register, which would allow them to reward card companies that charge less by turning more business their way. But the ASRs prohibit that practice, too, so that the card companies end up with no good reason at all to cut their prices to merchants. *See American Express*, 88 F. Supp. 3d at 207 (finding that ASRs "reduce American Express's incentive—as well as those

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[3] *See, e.g.*, Amex Tr. 208-09, 232-48, 389-90, 573-74, 1262-63, 1401, 1606-07, 1687-90, 2159-61, 2183, 2322-23, 2359, 2411-12, 2416, 3146-47, 6126.

of Visa, MasterCard, and Discover—to offer merchants lower discount rates").

A powerful example is provided by testimony from Discover at the government's *American Express* trial. Discover entered the credit-card industry pursuing a low-cost model—hoping to attract merchants into accepting the card by offering far lower swipe fees than its competitors at Visa, MasterCard, and American Express. This model may have helped Discover get its foot in the door, but it did not help Discover attract transaction volume. That is because ASRs prevent merchants from rewarding customers for using Discover at the register instead of its higher-cost alternatives. Discover thus abandoned its lower merchant swipe fees, because that price competition did not—indeed, *could* not—help it to capture market share. Supra-competitive swipe fees, which are then passed on in part to consumers, are the inevitable result of this kind of dynamic. *See id.* at 213-17 (explaining how ASRs "block low-cost business models" and "have resulted in higher prices to merchants and consumers").

A prohibition like the law at issue here—forbidding merchants from imposing a "surcharge" on the use of expensive cards, even while permitting them to offer a cash "discount"—is one kind of anti-steering rule that tends to create the same anticompetitive effect that the card companies have pursued themselves through their ASRs. That is because, if a merchant tells consumers that they are paying a "surcharge" based on the cost the merchant pays to accept a card, that could encourage consumers to use less expensive cards—or even to use debit cards, whose much lower prices are regulated by the Federal Reserve. Consumers might even want to get the best deal by using cash or personal checks, and the card companies might

lower their fees to merchants in order to avoid losing business through this form of competition. In this regard, state laws that prohibit labeling the cost of credit as a surcharge encourage the exact same kind of suppression of competition that the federal government is right now attempting to alleviate under the Sherman Act. And the ultimate effect of suppressed competition is, again, higher prices for merchants and their customers as well.

Simply put, state anti-surcharge laws are not consumer-protection legislation. They are, instead, anti-competitive, anti-consumer provisions that simply tend to increase card-company profits at the expense of merchants and their customers downstream. Indeed, laws that prohibit steering consumers away from expensive payment methods are special-interest legislation at its very worst—a giveaway to the card companies that protects an already highly concentrated and highly profitable industry from even the most basic levels of healthy competition.

2. Accordingly, it is no surprise that surcharge bans are the darlings of the credit card companies. As the petitioners explain at great length in their merits brief, these laws were sought by the card companies at the federal level first, and then at the state level when the federal ban lapsed in 1984.[4] *See* Petr. Br. 8-16. Genuine, well-established consumer-advocacy groups universally opposed these laws at both the state and federal level. Alongside that opposition,

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[4] For reasons of both business management and customer experience, many national merchants try to regularize their practices across all stores. Surcharge bans in large states (like New York) thus frequently affect merchant practices in states that do not have such bans, especially because local merchants are unlikely to impose surcharges in competition with large national retailers who do not.

governmental organizations from the Federal Reserve Board to the Federal Trade Commission identified surcharge prohibitions as economically unintelligible, too vague to reasonably administer, and likely to hide the true costs of credit cards from the consumers who control their usage. *Id.*

Merchants opposed some of these surcharge bans as well, but the widespread opposition of consumer advocates and government regulators to surcharge bans indicates that the problem with surcharge prohibitions is not a parochial concern, and that merchants do not resist surcharge bans because they want to somehow profit themselves from fees on consumers. Instead, merchant opposition is driven by the fact that hiding the experience of the swipe fee from consumers—the very people who decide which payment method to use—results in an economic inefficiency whose cost lands on the merchants *and* their customers.

The problem is what economists would call a "negative externality"—a cost that follows immediately from a consumer's decision to use a particular credit card over another form of payment, but that the consumer herself does not immediately experience. When negative externalities are present, a given product or service ends up being more prevalent than it "should" be in the economy: Supply and demand don't come together where they ought to, because the invisible hand of self-interest isn't communicating the full price of the behavior to the person who is choosing it. *See, e.g.*, Areeda & Kaplow, Antitrust Analysis, ¶110 (5th ed. 1997) (highlighting externalities as one circumstance in which competition fails to create efficient outcomes). And that certainly is true of the choices consumers make when they decide to use credit cards: "What most consumers do not know is

that their decision to pay by credit card involves merchant fees, retail price increases, a nontrivial transfer of income from cash to card payers, and consequently a transfer from low-income to high-income consumers." Scott Schuh, et al., Fed. Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments?* 1 (Aug. 2010); https://www.bostonfed.org/media/Documents/Workingpapers/PDF/ppdp1003.pdf1.

Indeed, the "externality" problem in credit card usage is in some respects worse than normal because consumers' incomplete information ends up hurting consumers *themselves*—especially poorer customers who do not qualify for the most lucrative rewards cards or who cannot qualify for any type of credit. It also harms consumers who choose to use debit cards or cash for budgeting or other purposes. The result is a kind of economy-wide tax that is borne in common by all payers of retail prices, whether they are a wealthy executive using an Amex Black Card or a family using food stamps to buy the same gallon of milk at the same price. Accordingly, while most of the spoils of this system accrue to the card companies themselves, they also flow in some small part to high-income consumers who use the most expensive reward cards. Federal Reserve economists have estimated the cross-subsidy at over $2,000 a year, paid disproportionately by the poorest households to wealthy individuals whose cards carry rich reward programs. *Id.*; *see also* Elizabeth Warren, *Antitrust Issues in Credit Card Merchant Restraint Rules*, Tobin Project Risk Policy Working Group 1 (May 6, 2007).

One right way to address a serious externality like this one is to effectively *communicate* the "real" price of an economic choice to the person choosing it. The more vivid the communication, the more likely the person will "internalize" the cost of the choice they are

making. Importantly, when an economic actor like a merchant tries to tie a consumer's price in part to that consumer's own, cost-increasing decision, they are typically not trying to make money on "fees" or "surcharges." More often, they would be much happier to see the consumer avoid the costlier choice altogether. Accordingly, steering efforts like surcharges directed at credit cards are not designed to make money for merchants, but to communicate effectively to customers that credit cards are costly and that those costs show up in the prices consumers pay. The ultimate goal is to *convince* customers, through effective price communication, to make a cheaper choice.

3. Surcharge bans have been a heavy focus for the card companies—and remain quite valuable to them—because there are more and less effective ways to communicate the real costs of the cards to consumers. Theoretically, any "fee" or "surcharge" that tries to get consumers to internalize a negative externality could be reframed as a "credit" off a higher baseline price for making a cheaper choice. Again, theoretically, that credit would be just as likely to encourage consumers towards the cheaper option as a corresponding "penalty" for taking the costlier route. As it turns out, though, this is all too theoretical: In the real world, framing matters—both when it comes to economic choices and political fights.

For example, Congress has long guaranteed merchants the right to offer a "discount" for using cash or the like, and yet the credit card companies have not attacked that legal rule, even as they have doggedly pursued limits on equivalent "surcharges." That is because it would be extremely difficult as a policy matter for the card companies to advocate for a law that makes a "discount" illegal—consumers and legislators would immediately see through that effort to insulate

credit cards from cash competition. But framing higher prices to credit-card users as a "surcharge" makes it possible to advocate for legislation against them because actions that seem to raise consumer prices look bad, even though card users who pay prices inflated by anti-competitive rules—and then do not receive a "discount" for using cash—are effectively worse off in the exact same way.

Relatedly, and more importantly, a wealth of behavioral economics research has demonstrated that mathematically equivalent "surcharges" and "discounts" are viewed quite differently by consumers, so that it remains quite valuable to the card companies to prohibit surcharging even though merchants are free to offer an equivalent cash discount. Although they are merely "different frames for presenting the same price information," Levitin, *Priceless*, 55 UCLA L. Rev. at 1351, surcharges and discounts touch directly on a recognized, "irrational" aspect of human behavior—namely, how people react to perceived gains or benefits as opposed to perceived losses or penalties. Jon Hanson & Douglas Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420, 1441 (1999); Daniel Kahneman, et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991). This research has shown over and over again that "changes that make things worse (losses) loom larger." Kahneman, *Anomalies*, 5 J. Econ. Persp. at 199. People hate to be penalized much more than they dislike foregoing a benefit. This aspect of our human behavioral irrationality is sufficiently pronounced that even manipulating the words we use to describe the same exact practice can be sufficient to trigger it.

In fact, multiple experts have identified this exact effect at work when it comes to surcharges and discounts in the credit-card context in particular. *See, e.g.*, Cass Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 Nw. U. L. Rev. 1295, 1312 (2003) ("[A] company that says 'cash discount' rather than 'credit card surcharge'" will trigger less consumer reaction because it will not harness loss aversion). The bottom line is that "[c]onsumers react very differently to surcharges and discounts." Adam Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 280 (2006). Because surcharges are perceived as losses, they can activate consumer reactions much more intensely than being informed of discounts that might be foregone by using a card. *Id.*; *see also* Edmund Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217, 219-20 (1990); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251, S261-62 (1986); Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behavior & Org. 39, 45 (1980).

In simple terms, the card companies lobbied hard for surcharge bans even though discounts were already permitted precisely because of their reasonable concern that surcharges would be more likely to work against them—that it was more likely to harm the card companies' brands by effectively conveying to consumers that credit cards have costs. Critically for present purposes, credit-card lobbyists expressly recognized that consumer *communication* was at stake: that surcharging hurts the card brands by making "a negative *statement* about the card to the consumer"

and "*talk*[*ing*] *against* the credit industry." *Cash Discount Act, 1981: Hearings on S. 414 Before the S. Banking Comm.*, 97th Cong. 9, 32, 60 (1981). This is to say that the surcharge label has communicative content that the discount label does not precisely because—as the card companies themselves recognized—a surcharge is more likely to cause consumers to associate the added cost with the card itself. And that, of course, is exactly the message that merchants should be able to send if they so choose.

SUMMARY OF ARGUMENT

Perfectly rational economic actors may not care if you call a dual-pricing regime a cash "discount" or a credit-card "surcharge." To human beings, however, it might well make a difference. Framing matters, particularly when it comes to how *prices* are framed for consumers making economic decisions. When sellers disclose prices in true and honest ways, they are communicating information that is essential to their businesses, to their customers, and to the economy. The choice of how to communicate that true and honest price information is speech, it is protected by the First Amendment, and it is essential to the proper functioning of our free-market system. *Va. Bd. of Pharm.*, 425 U.S. at 765.

Surcharge bans thus regulate commercial speech by limiting how merchants convey price information, and thus garbling the message they may want to send. Indeed, that is their only possible effect, because the actual economic practice of imposing separate prices on cash and credit cards is unambiguously *permitted*. The card companies nonetheless lobbied hard to get anti-surcharging laws like the one at issue here on the books, because they prefer the "discount" framing to the "surcharge" one. That is particularly true because

a blanket cash "discount" off card-inflated prices does not allow merchants to spur competition *among* credit cards by imposing *different* surcharges on more expensive or otherwise disfavored cards. The First Amendment protects both the consumers' right to receive true and non-misleading price information, *id.*, and the choices economic speakers make about how to convey it. The First Amendment does not allow government to require speakers to substitute theoretically equivalent words for the ones they believe will best express their message—especially when all that can *possibly* do is garble the message itself.

In fact, the law looks with deep skepticism on regulations (like these) that force actors to deliver their message one way instead of another. For example, the law does not permit the government to force a speaker to express an idea through one particular medium, *see, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); it recognizes that the speaker can choose among the images, symbols, and means of communication that most effectively convey her point, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 647 (1985); and it protects the speaker's right to choose the exact words that convey her message most effectively, even though—or maybe, because—"words are often chosen as much for their emotive as their cognitive force." *Cohen v. California*, 403 U.S. 15, 26 (1971).

Moreover, the First Amendment applies particular skepticism to laws or regulations that affect the public debate by reshaping its terms in ways that favor one side or that deprive the other side of its most effective means of communication. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978). Allowing governments to warp the terms of

the public conversation to suit their preferences, or to force others to describe what they are doing in ways that do not match their conception of reality, is a plain regulation of speech that the law must view with healthy skepticism.

Nor should the fact that commercial actors are involved change the First Amendment calculus—truthful communications designed to entice, affect, or even coerce the economic behavior of other economic actors are undoubtedly protected speech to which the balancing-test protections of the First Amendment must be applied. *See, e.g.*, *Claiborne Hardware*, 458 U.S. at 907-11; *Va. Bd. of Pharm.*, 425 U.S. at 757, 764, 770. Indeed, this rule is necessary to protect against government efforts to control the terms on which its *own* commercial policies are debated.

Suppose that the government were to raise the sales tax, while requiring merchants to describe the new rate as a "mandatory contribution to the state education fund" rather than a "tax." Or suppose the government were to forbid imposing sales tax as a separate charge at the register, and instead forced merchants to bake it into general prices, so as to lower the salience of the tax to consumers. The First Amendment violation in that instance would be obvious—the government is targeting the communicative content of a merchant's practices for the government's own ends, cognizant of the extent to which framing matters in how effective speech against its policies will be.

That same rule applies when it comes to a government enforced distinction between discounts and surcharges. In fact, to the extent that there is a difference for consumers between those two descriptions of

the same economic reality—to the extent they *feel* differently about them—that only *confirms* that government should not be choosing between them.

Of course, that is not the end of the matter: The Court must still decide whether this speech restriction might be justified to prevent consumers from being misled by price advertising or the like. Here, we agree with petitioners that both the vagueness of the law and the fact that it does not permit so-called surcharging even under circumstances where deception is impossible must lead to its invalidation under *Central Hudson*'s balancing test.

In the end, the key point is that while many merchants may not *want* to use surcharges rather than discounts (because, among other things, consumers don't like them), they should have the *right* to do so—constrained by the forces of competition and sound business strategy rather than government speech codes. Merchants want to make their purchasers happy: Recognized stores—be they national brands or popular local outlets—have a brand of honesty, integrity, customer service, and competitive pricing to protect. Whatever dual-pricing practices merchants might pursue will be governed by those forces *and* the fact that being a merchant (unlike being a credit card company) is a highly competitive industry. But the choice of how to navigate those concerns while communicating honestly with consumers about credit-card costs is protected by the First Amendment—as is the right of merchants more generally to communicate effectively and honestly to their consumers how other costs end up in the bottom line. Thus, it is essential that this Court affirm merchants' ability to communicate with their consumers in the way that is most likely to get through to them—confirming that economic actors have a right under the First Amendment

to try to influence others' choices by telling *the truth* in the way they choose to do it. This Court should reaffirm that right, and reverse.

ARGUMENT

I. Anti-Surcharging Laws Target Communicative Content Rather Than Conduct

Petitioners' brief effectively demonstrates that state surcharging bans have both the purpose and effect of regulating merchant communication rather than conduct. That is because the effect of these laws is to compel merchants to *describe* their dual prices for cash and credit in a particular way that warps the terms of the public debate and generates particular perceptions of the card companies.

One surefire way of recognizing that surcharge bans regulate speech rather than conduct is to recognize that they do not regulate the underlying economic conduct *at all*. The only identifiable economic "conduct" here is charging one price to use a credit card and another to pay by cash or check. Every single state permits that conduct whether they have a surcharge ban or not. Surcharge bans thus cannot be passed off as regulations of economic activity; they leave that activity utterly unchanged.

In fact, the *only* effect that surcharge bans have on prices when cash discounts are permitted is to suppress critical competitive information that the economy needs to function best. While a blanket cash discount permits dual prices, it does not allow merchants and their consumers to differentiate *among* the various credit cards consumers can use. As the Discover example indicates, *supra* p.7-8, suppressing that information has powerful anticompetitive effects, and prevents the free market from operating as it should.

This effect isn't even one that surcharge laws are intended to create: Respondent has never attempted to justify its law by invoking the need for a uniform, *inaccurate* discount as opposed to an *accurate* surcharge tied to the particular swipe-fee costs associated with particular cards. But that just shows the danger of regulating the *way* in which merchants communicate accurate and non-misleading price information (i.e., surcharge vs. discount), rather than an underlying economic practice (i.e., differential pricing), which these laws seem calculated to permit.

In fact, these laws clearly do regulate the content of merchant communications, in both purpose and effect. That is true in at least three key respects.

First, and most importantly, anti-surcharge laws are fundamentally directed at the effect that truthful information might have on consumers. In *Virginia Board of Pharmacy*, this Court recognized that when price information is regulated because of how consumers might react to it, the government is regulating speech, and must justify that regulation under the First Amendment. *See* 425 U.S. at 765. That justification will be difficult because the free flow of accurate price information is essential to the proper functioning of the free market, *id.*—laws that prevent the most vivid possible communication of how much credit cards cost the economy not only impinge on the free-speech rights of merchants, but on the reciprocal rights of consumers to receive useful economic information. Put otherwise, the gag order on calling a dual pricing regime a "surcharge" doesn't just hurt merchants who want to communicate effectively with their customers, it also hurts their customers, who aren't being told very effectively that they are—in economic reality—being surcharged if they do not pay in cash.

Indeed, to the extent that such regulations are premised on how surcharges affect consumers differently from cash discounts, that only *confirms* that the laws are regulating otherwise protected speech. At bottom, commercial speech doctrine embodies fundamental skepticism towards paternalistic assumptions about "the reactions it is assumed people will have" to true and non-deceptive economic information. *Id.* at 769. Surcharge bans fit neatly within that category because they treat the non-misleading representation that cards are more costly than cash as some kind of inconvenient truth that consumers should not be forced to confront at the register. *See id.* at 770 (courts must "assume that [price] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them"). Masking the way that cards inflate prices by letting them rise and offering cash "discounts" preferences *dis*information over the truth. Ignorance of the real costs of a choice among those who make it is something false-advertising laws—and any sound economic or public policy—is supposed to fight *against*.

Second, surcharging bans have a one-sided effect on the literal "terms" of the public debate around credit cards and the effects that they have on prices and the economy as a whole. In lobbying for such laws, the card companies recognized that a surcharge—much more than a discount—"makes a negative *statement* about the card to the consumer" and "*talk[s] against* the credit industry." *Cash Discount Act Hearings*, at 32, 60 (emphasis added). Meanwhile, states that have banned surcharging have openly relied on the "psychological[]" effectiveness of the "surcharge" framing as a reason to ban it. Framing cards

as *increasing* costs in the retail economy is exactly what merchants like the plaintiffs here are trying to convey; that message is garbled when they are required to frame the use of cash as a benefit rather than the use of credit as a burden. Simply put, at least in their effect (if not their purpose), surcharge bans function as a gag order that prohibits "negative statements about the card to the consumer," as well as "talk[ing] against the credit industry." The way these laws accordingly skew perceptions about credit cards among the public vividly demonstrates that they are regulations of speech, not conduct.

Importantly, that affects not only economic behavior by consumers, but our politics as well. Forcing merchants to "normalize" the inflated prices generated by expensive credit card swipe fees, and then offer positive "discounts" for using cash, predictably minimizes the effects expensive cards have on the economy in the public imagination. When the public cannot see the real cost of an apparently free rewards programs or cash-back offers on their cards, it becomes much harder to make the case for regulating or otherwise addressing their fees—fees that largely pay for corporate profits rather than cardholder rewards. Meanwhile, nothing prevents the card companies from both relentlessly advertising their credit products and generating positive feelings with the public by offering them what appear to be "free" rewards. Merchants must be able to combat that message with their own; and they must be free to communicate on the terms that they believe are most likely to land so long as they are true and non-misleading. Indeed, "unless consumers are kept informed about the operations of the free market system, they cannot form 'intelligent opinions as to how that system ought to be

regulated or altered.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 519 (1996) (Thomas, J., concurring) (quoting *Va. Bd. of Pharm.*, 425 U.S. at 765). The extent to which surcharging bans can manifestly "impede debate over central issues of public policy," *id.* at 503 (plurality), again confirms that they are regulations of speech, not conduct. *See also* Pet. App. 76a (noting "powerful noncommercial valence" of these issues).

Third, the effort to use honest communication in the economic sphere to convince others to change their behavior is speech—often, paradigmatic speech. Consider *NAACP v. Claiborne Hardware*, 458 U.S. at 911, which held that a boycott of white businesses in Alabama was protected speech, notwithstanding the fact that it took the form of economic conduct (refusing to patronize certain businesses) and was intended to influence others or even coerce them to change their ways. *See id.* ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper.") (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). To be sure, there is a huge difference between urging businesses to support desegregation and urging consumers to use cash instead of credit, but First Amendment rules cannot depend on value judgments about the content of various forms of speech or advocacy.[5] Instead, the First

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[5] To the extent that such distinctions are permitted at all, it is through the use of the more flexible *Central Hudson* balancing test for commercial speech, rather than the more stringent tests

Amendment recognizes that people have the right to speak through economic actions that have communicative force. State laws that prohibit merchants from doing so by making their communication less effective are clearly regulating their speech, not just their conduct. Put otherwise, the extent to which "surcharging" is calculated to have a stronger effect on the behavior of consumers than "discounting" is a reason to regard it as communicative, just as boycotts aimed at business owners' pocketbooks are communicative—both are protected because they *work* to get the key message across, and encourage others to change their ways.

Indeed, as this Court explained in *IMS v. Sorrell*, the government cannot use the law to "diminish the effectiveness" of truthful, non-misleading communication because the state has determined that it is too powerful, or "because of disagreement with the message it conveys." 564 U.S. 552, 565-66 (2011). A law that works to prevent merchants "from communicating with [consumers] in an effective and informative manner," thereby "diminishing [their] ability to influence [consumer] decisions," is a speech regulation, and must satisfy First Amendment scrutiny. *Id.* at 564, 577.

The reason this is so important to merchants is that pricing-related speech is both (1) often easily characterized as mere economic conduct; and (2) often the single best tool merchants have available to communicate with their customers. It is thus essential that this Court recognize that regulations aimed at

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that have been applied to political speech or the like. The point here, however, is only that such laws clearly regulate *speech* rather than conduct—just as they did in *Claiborne Hardware*—and that a test like *Central Hudson*'s must therefore be applied.

how prices are communicated or framed for consumers remain understood as regulations on speech rather than conduct, notwithstanding the obvious power that the government has over what is bought and sold, and the prices that are paid in those transactions. The law can impose price floors, but cannot force merchants to characterize them as the merchant's chosen prices when they would like to charge less. The law can force merchants to increase their prices by including a sales tax, but it cannot compel them to withhold from consumers the role that tax plays in the prices they pay. The law can forbid merchants from selling certain products at all, but it cannot force them to characterize those products as good or bad or out of stock when that's not what's going on. And most relevant of all, the law can forbid dual prices—it can force merchants to charge only one price if that is what the people's elected representatives want—but it cannot skew the debate around credit card acceptance by only permitting dual prices so long as merchants describe what's happening in the way those representatives (or the card companies' lobbyists) like best.

This can seem like an ironic rule—that, for example, a state could ban all dual pricing but cannot prohibit a surcharge while it allows a discount. But it is vitally important. Price lists and receipts are the main conduit for information about the economy to flow between buyers and sellers; this Court has observed that this information is frequently *more* important than any other in the lives of individuals who are trying to make ends meet. *Va. Bd. of Pharm.*, 425 U.S. at 763 ("As to the particular consumer's interest in the free flow of commercial information, that inter-

est may be as keen, if not keener by far, than his interest in the day's most urgent political debate."). Accordingly, accurate and effectively communicated price information is essential for those individuals to make good economic choices *and* good political choices. When the government forbids economic conduct—say, by outlawing a product or capping a price—the source of the restriction is apparent. But when the government monkeys with the way that *permitted* economic practices are characterized, it obscures the truthful messages that help economic actors decide how to behave in the market, and that help political actors decide how to respond to perceived market failures.

In fact, it's not hard to recognize how a ban on surcharges in this area has affected public perceptions generally. The most proximate result of these prohibitions is that most consumers have *no idea* how expensive credit cards are for merchants to accept, and the consequent costs they impose on the economy. Consider whether, before this very case, it ever occurred to you that choosing to use your credit card rather than cash at your favorite local store is costing the shopkeeper three percent of her revenue on your sale. Or consider whether you understood that using your basic Visa card costs the merchant less than using an American Express Gold Card. Consumers are most likely to learn that reality from effective commercial speech they can see on receipts and experience at the register. Stifling the effective flow of that information does not just abridge the rights of merchants, it interferes with an important mechanism for making the free market work for everyone.

Importantly, if this Court were to reaffirm (as it should) that pricing communication designed to influence consumer choices by effectively conveying truthful price information is speech for First Amendment purposes, it would not in any way limit the government's ability to regulate that influence if it is being deployed to trick or mislead consumers. As explained below, the conclusion that framing the cost of credit as a "surcharge" is speech means that restrictions on that speech are subject, at a minimum, to the balancing test for commercial speech, which both (1) only protects non-misleading speech; and (2) permits the government to pursue a legitimate interest in avoiding possible consumer deception or confusion. Conversely, if this Court were to hold that laws like these regulate conduct, it would be forced to affirm them even if their manifest purpose and effect is to shield consumers from the truth, and to trick them into making bad choices to the benefit of someone else.

In short, because surcharge bans permit merchants to charge dual prices reflecting the cost of credit cards, but prohibit merchants from communicating about those costs in the most effective way, they are speech regulations that must pass First Amendment muster. That is because, while government can certainly control marketplace behavior, it remains subject to the aegis of the First Amendment when its actions affect the terms of our public discourse—be it one about economics, politics, or both. The stakes of this issue extend beyond surcharge bans, to other ways in which government may try to exercise soft pressure on our politics by changing the ways that economic actors share information with consumers about the prices they pay. Accordingly, the most important thing for the Court to affirm in this

case is that the "surcharge" framing at issue here is protected commercial speech.

II. Surcharge Bans Fail Central Hudson

Central Hudson, the basic balancing test for commercial speech, imposes an intermediate form of scrutiny on regulation of such speech. It asks whether commercial speech "concern[s] lawful activity"; whether it is "misleading"; "whether the asserted governmental interest is substantial"; "whether the regulation directly advances the governmental interest asserted"; and whether the law "is not more extensive than is necessary to serve that interest." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). *Amici* recognize that certain kinds of surcharge bans might theoretically advance a government interest in avoiding a bait and switch for consumers, or in avoiding misleading advertising. The problem for this law is that it does not advance that interest in a fashion that is even remotely well-tailored to the relevant government end.

A basic hypothetical makes this clear. Imagine that a low-cost grocery store airs a television commercial that clearly explains that its prices are kept low by "charging credit card users the costs we pay to accept those cards, so we can pass on the best possible savings to you if you are willing to pay in cash." Indeed, imagine the store specifically encourages users of food stamps to shop there because, "by charging our credit-card customers a higher price, we are able to pass on unbeatable savings to our cash and food-stamp customers." There is nothing remotely deceptive about this advertisement—the consumer knows, far in advance, that the store's prices will be higher if he wants to use a card, and that the store may have

some particularly attractive deals for cash or food stamp purchasers. Yet New York law forbids this advertisement; it simply does not permit a merchant to cure possible confusion with disclosure if the disclosure is that it charges consumers "more" to use a credit card. That approach is both antithetical to the First Amendment's basic premise that the answer to most problems is more speech, not less, and obviously leaves the law ill-tailored to any asserted interest in preventing confusion or deception.

In fact, a "deception" rationale for surcharge bans is completely backwards; the surcharge label communicates the real cost of credit to consumers *more* effectively than a "discount" for using cash. *See* Pet. App. 76a (district court finding that, because surcharges "truthfully and effectively convey[] the true cost of using credit cards, they" "actually make consumers more informed rather than less"). Because surcharge bans create the opposite effect from their asserted benefit, there is simply no way they can satisfy *Central Hudson*.

Ironically, the best proof of the absence of any legitimate governmental interest in preventing surcharges may lie in the fact that, if these laws are invalidated (as they should be), the broader merchant community does not necessarily expect widespread surcharges to result. As the social science discussed at length above indicates, many consumers do not like surcharges—they would rather have higher prices and "free" reward miles for their purchases than have lower prices plus a surcharge that ends up leaving them in the same place. Because surcharging is likely to be unpopular, and the retail business is both highly competitive (unlike the credit card business) and

highly dependent on maintaining a positive reputation with customers, the force of competition may serve as a natural brake on merchants choosing to communicate through surcharges. Moreover, that competition will be an even more effective brake on surcharges that take the form of a bait-and-switch or last-second price increase at the register—a practice that is certain to leave consumers unhappy and unlikely to return. Although even this much is unlikely, the only kind of surcharges merchants might even consider pursuing would be clear that the significant costs imposed by the card companies are the cause of the surcharge in order to avoid consumers blaming merchants for costs they do not control. Accordingly, the only thing that surcharge bans are likely to suppress is true, transparent, and non-misleading information about the costs created for consumers when they use their credit cards.

In addition, the fact that widespread surcharges may be unlikely even without these laws proves two critical points about why merchants should nonetheless have the right under the First Amendment to choose to use the surcharge label if they so choose. First, the fact that consumers really do not like surcharges shows that they are *effective*—rather than *deceptive*—in communicating the key price information about credit cards to consumers. The First Amendment protects a speaker's choice of words even if they are "chosen as much for their emotive as their cognitive force," *Cohen*, 403 U.S. at 26, and the government has no business suppressing the most palpable form of connection a commercial speaker can make between credit cards and increased costs.

Second, the fact that merchant surcharges will be constrained by competition shows that what the credit-card industry really needs is more competition rather than less. As explained at the outset, a surcharge ban is a kind of anti-steering rule that effectively suppresses horizontal, interbrand price competition among the card companies over merchant swipe fees. (It also suppresses potential competition among merchants over whether to surcharge or not, as in the case of the hypothetical low-cost grocer above, *see supra* p.28.) A commercial speech regulation whose primary effect is to suppress the flow of accurate price information and thus limit effective free-market competition is a paradigmatic violation of *Central Hudson*. *See 44 Liquormart*, 517 U.S. at 503-04. Given that the credit-card market is already far less competitive than the retail market, it is particularly unjustifiable for the government to enact a commercial speech regulation that makes it even harder for merchants to spur competition among the card companies—protecting those already ironclad brands against "negative statements" that might make a difference in both the economic marketplace and the marketplace of ideas.

In the end, though, this is not just about surcharges—it is about the right of commercial actors to characterize their pricing practices in concededly accurate and non-misleading ways that are nonetheless calculated to get their point across to consumers. The Court should reaffirm here that the First Amendment protects that right, for the sake of the speaker, the listening consumer, and the market as a whole.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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EXPRESSIONS HAIR DESIGN, *et al.*,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF SCHOLARS OF BEHAVIORAL ECONOMICS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

Amici are eleven professors in the fields of economics, management, decision science, psychology, and public policy who engage in significant research and teaching on behavioral science and behavioral economics, and in particular on applications to consumer economic behavior. *See* Appendix (listing individual *amici*).

This brief addresses issues that are within *amici's* particular areas of scholarly expertise. In addition, in light of the Court's decision to consider this case, some *amici*—scholars at the Harvard Kennedy School and Harvard Business School—conducted a randomized, controlled experiment to study the relative impact of cash discounts and credit-card surcharges on consumer preferences. The results of that experiment are reported here.

Behavioral economics brings psychological insights to economic theories of human behavior to explain decision-making, particularly in markets. Behavioral economics has shown in many situations that consumer behavior systematically departs from that predicted by traditional economic theory, which tends to assume more purely rational, mathematical decision making and often fails to fully describe real-world behavior.

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. *Amici* advised counsel for all parties of their intent to file this brief around November 11, 2016, and the parties have consented to the filing of this brief. *See* Sup. Ct. R. 37.3.

Amici believe that this case—which concerns the significance of framing effects under the First Amendment—presents perhaps the first opportunity for this Court to consider the insights of behavioral-economic theory in reaching its decision. As relevant here, behavioral economics reveals that consumers' purchasing decisions are influenced significantly by the way in which price information is framed. The state no-surcharge laws at issue in this case limit the manner in which merchants communicate to their customers the costs of credit-card transactions, forcing merchants to frame those costs in a way that biases consumers toward credit-card use. *Amici* possess expertise on the effects of that framing.

SUMMARY OF ARGUMENT

Merchants pay fees on every credit-card transaction and find ways to pass the cost of these fees on to their customers. Under the "no-surcharge" laws of New York and several other states, however, merchants are permitted to charge different prices for customers paying with cash versus with credit cards, but are restricted in the way they describe the mathematical relationship between the two prices. They can provide "discounts" for cash purchases, but are criminally prohibited from setting "surcharges" on credit-card transactions. Thus a merchant could advertise a regular price of $100 and offer a $3 cash discount, but could not advertise a regular price of $97 with a $3 surcharge when paying with a credit card.

Under traditional economic theory, the market impact of a "cash discount" should be the same as the impact of a "credit-card surcharge." Credit-card customers pay more, and cash customers pay less,

regardless of the label attached. Traditional economic theory would thus predict that a cash-discount framing would induce consumers to pay with their credit cards at the same rate as an economically equivalent credit-card surcharge framing. After all, surcharges and cash discounts are just two ways of conveying identical information about the relationship between two prices.

But behavioral economics research shows that these two framings do not generate equivalent preferences. Instead, consumers' decisions can be materially influenced by the manner in which information is presented: a perceived reward garners a minor, positive reaction, while a perceived penalty produces a strong, negative reaction.

Recent research conducted by some of the leading scholars in this discipline—including immediate work by *amici* conducted specifically for inclusion in this brief—confirms what the theories suggest. When faced with a choice between using cash and credit, consumers are more likely to use cash to avoid credit-card surcharges than to earn cash discounts. As a result, no-surcharge laws limit how merchants communicate material information to customers.

ARGUMENT

I. Behavioral-economics research shows that framing a choice as either a prospective loss or gain materially influences people's decisions.

Behavioral economics is a relatively new field—about 35 years old—that stands at the intersection of traditional economics and other social sciences, especially psychology. Christine Jolls, Cass R. Sunstein, and Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471 (1998). Traditional economics tends to assume that people make decisions based strictly on rational considerations, maximizing their self-interest. Richard H. Thaler, *Misbehaving: The Making of Behavioral Economics*, at 4-5 (2015). Behavioral economics challenges that notion by unearthing the ways in which rational decision-making is undermined or outright turned on its head by the cognitive limitations, biases, and mental shortcuts endemic to human decision-making. *Id.* at 5-6.[2]

The field was launched by the work of two psychologists, Daniel Kahneman—one of the *amici* represented here—and Amos Tversky. Their work on this topic earned Kahneman the Nobel Prize in

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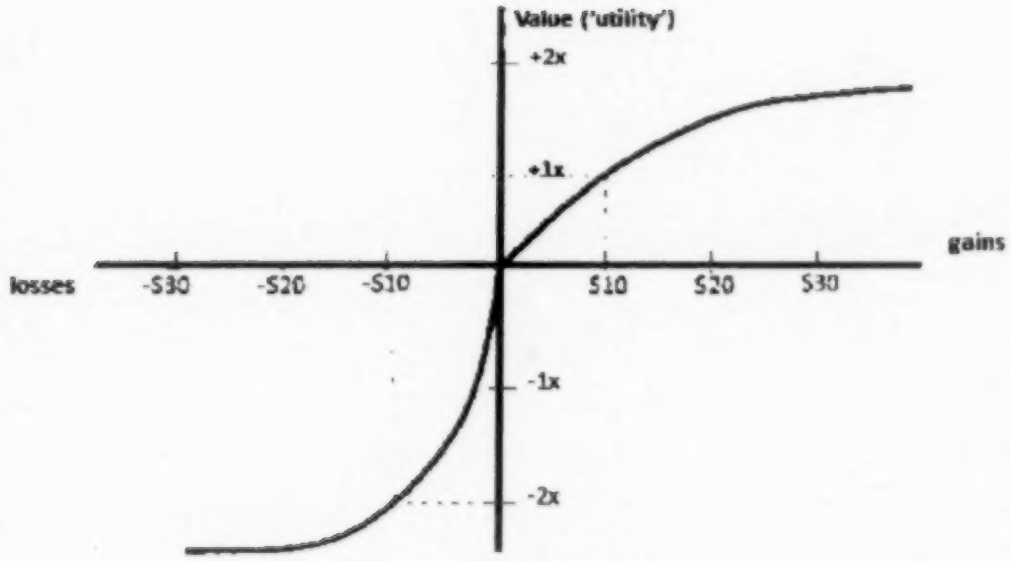
[2] In recent years, these findings have even migrated from the academy into mainstream consciousness and policymaking circles. Such works as Daniel Kahneman's *Thinking, Fast and Slow* (2011), Richard Thaler and Cass Sunstein's *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008), and Michael Lewis's *The Undoing Project: A Friendship That Changed Our Minds* (2016), have all helped to bring the key insights of behavioral economics into the popular imagination.

economics in 2002 and is the focus of the forthcoming popular-press book by Michael Lewis called "The Undoing Project." One key implication of their "prospect theory" is that people make different decisions depending on the way information is presented, even when the information presented is substantively identical. *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, Econometrica 47(2), pp. 263-91, March 1979; *see also* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, Science, Jan. 30, 1981, at 453-58.

Kahneman and Tversky's research, and many other studies since, show that people are loss averse; people will go to greater lengths to avoid a perceived loss than they will to obtain a perceived benefit, even if the loss and benefit are of otherwise objectively equal value. In economic terms, there is an asymmetry in anticipated value from comparable gains and losses.

To help visualize the theory, the graph below reflects a hypothetical reference point—circumstances as they exist before a choice is made—identified as the intersection between the x and y axes. The line then reflects the value a person perceives from an economic change in circumstances based on a given prospect or choice. The different steepness of the blue and red lines shows that humans are asymmetrically averse to losses. Here, a gain of $10 (on the horizontal axis) is anticipated to generate 1x in value/utility (on the vertical axis) while a loss of $10 (on the horizontal axis) is anticipated to generate 2x in displeasure/disutility (on the vertical axis).



While the foregoing is a theoretical example, research confirms that real-world choices are consistent with the theory; the prospect of loss looms larger than the prospect of comparable gain. For example, a recent field study revealed that teachers in a low-income school district generated more positive student outcomes when threatened with the loss of a *pre-paid* bonus if students performed poorly, as compared with teachers who were offered an economically identical, *end-of-year* bonus tied to student achievement. Roland G. Fryer, Jr., Steven D. Levitt, John List, Sally Sadoff, *Enhancing the Efficacy of Teacher Incentives Through Loss Aversion: A Field Experiment*, National Bureau of Economic Research Working Paper No. 18237 (July 2012).

In another study, researchers found that people are more likely to use their credit cards if they are told about the *losses* they will suffer if they choose a competing payment method, rather than if they are told about the *gains* they will experience by using their credit cards. Yoav Ganzach and Nili Karsahi, *Message Framing and Buying Behavior: A Field Experiment*, Journal of Business Research 32, 11-17 (1995).

A third field study subjected the putts of PGA golfers to the predictions of prospect theory. It found that when putting for par (i.e., the number of strokes it is expected to take to finish a particular hole), the golfers were more likely to make their putts than when putting for one under par (i.e., finishing the hole with one less stroke than expected). When putting for par, the golfer is trying to avoid a loss because a missed shot means losing one stroke relative to expectations. On the other hand, putting for one under par means the golfer is putting for a gain. The improved accuracy associated with putting for par, compared to putting for one under par, showed that the golfers were more motivated to avoid losses than experience gains. *See* Devin G. Pope and Maurice E. Schweitzer, *Is Tiger Woods loss averse? Persistent bias in the face of experience, competition, and high stakes*, The American Economic Review 101, no. 1 (2011): 129-157.

II. Consistent with the predictions of prospect theory, no-surcharge laws have a measurable impact on consumer preferences.

As behavioral-economics pioneer Richard Thaler predicted in 1980, framing a transactional cost as a credit-card "surcharge" rather than as a cash "discount" has a material impact on consumer behavior. When customers are offered a small discount for paying in cash, they are often willing to ignore it for the sake of convenience, treating the discount as a foregone opportunity. When consumers are asked to pay a premium on top of the perceived base price, however, they perceive it as an out-of-pocket cost. Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behav. & Org. 39, 45 (1980). And, as Thaler explained, credit-card companies came to understand that nominal "surcharges" would accordingly "discourage customers from using credit cards." *Id.* at 45 n.6. As a consequence, the credit-card industry "turned its attention to form rather than substance" and began lobbying for laws requiring merchants to characterize price differentials as cash "discounts." *Id.*

Indeed, subsequent research supports that prediction. For example, a Dutch study confirmed that consumers have a strongly negative reaction to surcharges but not an especially positive reaction to cash discounts. E. Vis. & J. Toth, *The Abolition of the No-Discrimination Rule*, Report For European Commission Directorate General Competition 12 (2000), available at http://www.creditslips.org/files/netherlands-no-discrimination-rule-study.pdf. Seventy-four percent of the respondents in the Dutch study viewed

surcharges as "bad" or "very bad," but only 22 percent viewed cash discounts as "good" or "very good." *Id.*

In light of the Court's decision to consider this case, scholars at the Harvard Kennedy School and Harvard Business School—amongst the *amici* represented here—conducted a randomized, controlled experiment to study the relative impact of cash discounts and credit surcharges on consumer preferences.

The experiment involved randomly assigning 820 participants to one of two groups. Those assigned to each group read a scenario in which they had to choose between paying with cash or credit card. The scenarios differed in whether they framed the price differential as a cash discount or a credit-card surcharge. Since the groups were randomly assigned, they can be assumed to be nearly identical in their pre-existing preferences, behavior patterns, and beliefs. This allows the researchers to interpret differences between the two groups in their preferences for using cash or credit card as caused by the way the information was framed. Randomized experiments like this one are considered the "gold standard" method for determining the causal impact of a single variable (e.g., how a price differential is framed) on an outcome (e.g., expressed preference for credit card or cash).[3]

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[3] Participants were 49% female, and had a mean age of 34.5 years. The experiment was conducted between November 9th and November 11th, 2016, using a population of respondents recruited on Amazon's Mechanical Turk. The researchers pre-registered their analysis plan and the specific materials and format used in the experiment on a public website, https://osf.io/rc5mn/. The experiment data are also available there. This form of transparency and *ex ante* commitment to the experiment's hypothesis is an emerging best practice in scientific research.

Those assigned to the credit-card-surcharge group were presented with the following scenario:

> Imagine that you have a credit card and $220 in cash in your wallet/purse. You buy food at a convenience store.
>
> The salesperson says it costs $130 if you pay with cash (regular price). If you pay by credit card, there would be a surcharge (an additional fee) of around 3%. If you pay with a credit card, the total cost would be $133.90.
>
> Would you pay by credit card or pay with the $220 in your wallet/purse?

Those assigned to the cash discount group were presented with the following scenario:

> Imagine that you have a credit card and $220 in cash in your wallet/purse. You buy food at a convenience store.
>
> The salesperson says it costs $133.90 if you pay with credit card (regular price). If you pay with cash, there would be a discount (reduction in price) of around 3%. If you pay with cash, the total cost would be $130.00.
>
> Would you pay by credit card or pay with the $220 in your wallet/purse?

The results were strikingly consistent with prospect theory's predictions, and with the prior research discussed above. Of those assigned to the credit-card surcharge group, 11% chose to pay with credit card. Of those assigned to the cash discount group, 18% chose to pay with credit card. Put differently, describing the

price differential in terms of a credit-card surcharge reduced preferences to use a credit card by more than one-third relative to describing the price differential as a cash discount. This difference is strongly statistically significant; the probability that this difference arose due to chance is 1 in 200.

CONCLUSION

Prospect theory predicts that the way economic choices are framed has a material impact on consumer preferences. Related research and now, thanks to *amici*, a randomized, controlled experiment confirms what prospect theory predicts about the impact of framing the price differential between paying with cash or credit card as surcharges or cash discounts. Consumers are more likely to prefer paying with credit card when the price differential is framed as a cash discount rather than as an economically equivalent credit-card surcharge. No-surcharge laws thus limit merchants' ability to convey material information to their customers.

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v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Cash Discount Act, 1981: Hearings on S. 414 Before the S. Banking Comm., 97th Cong. (1981) 10, 12

Other Authorities

Terri Bradford & Fumiko Hayashi, Federal Reserve Bank of Kansas City, *Developments in Interchange Fees in the United States and Abroad* (Apr. 2008) 7-8

Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265 (2006) 7

Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv. J. on Legis. 1 (2008) ..... *passim*

Samuel J. Merchant, *Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee Regulation in the Wake of Landmark Industry Changes*, 68 Okla. L. Rev. 327 (2016) 10, 13

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INTEREST OF AMICUS CURIAE[1]

United States Public Interest Research Group Education Fund, Inc. ("U.S. PIRG Education Fund") is a 501(c)(3) independent, non-partisan organization that works on behalf of consumers and the public interest. Through research, public education, and outreach, it serves as a counterweight to the influence of powerful special interests that threaten the public's health, safety, or well-being. U.S. PIRG Education Fund participates as amicus curiae in cases that will have a substantial impact on consumers and the public interest, such as this one. U.S. PIRG Education Fund has long advocated on the issue of swipe fee reform. U.S. PIRG Education Fund believes that cash customers should not pay more to subsidize credit card reward programs and supports efforts to make the costs of credit transparent to consumers.

INTRODUCTION AND SUMMARY OF ARGUMENT

New York's no-surcharge law is exactly the kind of "highly paternalistic approach" that this Court established the commercial-speech doctrine to forbid. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). The law "keep[s] the public in ignorance" about important price information. *Id.* It distorts the marketplace, leading to higher prices for everyone and hitting the poor the hardest. *See id.* at 763-64. It does so in the service of goals that are unrelated to protecting the

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[1] This brief was not authored in whole or in part by counsel for a party and no one other than amici curiae and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

public. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980). And most insidiously, it hides those higher prices and the reason for them from consumers. *See id.* In that way, the law insulates itself from public disapproval and challenge.

Those circumstances make this a paradigm case for application of *Central Hudson*'s "intermediate scrutiny" test for restrictions on commercial speech. *See id.* at 566. Some amici for petitioner, however, are not content to argue that the law is unconstitutional under *Central Hudson*. Seizing on recent decisions of this Court that have created uncertainty over the relevant test, these amici ask the Court to instead review the law under the exacting strict-scrutiny standard. *See* Albertson's, et al. Br. on Pet.; *see also* Cato Inst. Br. on Pet.

To do so would be both unnecessary and unwise. It would be unnecessary because, as amici agree, New York's no-surcharge law fails even under intermediate scrutiny. Where, as here, a state law attempts to drive consumer behavior by keeping consumers in the dark about relevant price information, the law will virtually always fail *Central Hudson*.

And it would be unwise because it would ignore the "common-sense differences" between commercial and other forms of speech that undergird the commercial-speech doctrine. Though sometimes maligned, *Central Hudson* has proved itself flexible enough to strike down unjustified speech restrictions while leaving room for legitimate economic regulation of misleading and coercive commercial speech. That this Court has upheld only a handful of commercial-speech restrictions belies amici's concern that the test insufficiently protects First Amendment values.

For these reasons, this Court should hold New York's no-surcharge law unconstitutional under the *Central Hudson* test.

ARGUMENT

I. The No-Surcharge Law Is a Classic Example of an Unconstitutional Restriction on Commercial Speech.

New York's no-surcharge law deliberately keeps consumers in the dark about important pricing information, and does so for reasons unrelated to protecting those consumers from false advertising or other harm. This Court has encountered such paternalistic laws before and has consistently held them to be unconstitutional restrictions on commercial speech. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Va. State Bd. of Pharmacy*, 425 U.S. 748. New York's law is a paradigmatic example of an unjustified commercial-speech restriction. It, too, is unconstitutional.

A. This Court's protection of commercial speech "is justified principally by the value to consumers of the information." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *see also Cent. Hudson*, 447 U.S. at 563 ("[T]he First Amendment's concern for commercial speech is based on the informational function of advertising."). The commercial-speech doctrine grew out of this country's consumer movement in the 1970s and "was forged as a tool of consumer protection to secure the value of commercial speech to society." Shanor, *The New Lochner*, 2016 Wis. L. Rev. 133, 143-44 (2016). Thus, the plaintiffs in *Virginia State Board of Pharmacy*, which for the first time recognized a First Amendment interest in commercial speech, were not businesses, but consumers.

425 U.S. at 753-54. And this Court's decision in that case "reflected the conclusion that the same interest that supports regulation of potentially misleading advertising, namely, the public's interest in receiving accurate commercial information, also supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages." *44 Liquormart*, 517 U.S. at 496 (opinion of Stevens, J.).[2]

New York's no-surcharge law undermines that constitutional interest by depriving consumers of highly relevant commercial information. The law prohibits merchants from disclosing that they have added an extra cost to the price of goods or services to cover the fees on credit-card transactions—so-called "swipe fees." *See* N.Y. Gen. Bus. Law § 518; Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv. J. on Legis. 1, 9-10, 9 n.35 (2008). The law

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[2] *See also United States v. United Foods, Inc.*, 533 U.S. 405, 426 (2001) (Breyer, J., dissenting) ("This Court has described the First Amendment's basic objective as protection of the consumer's interest in the free flow of truthful commercial information."); *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) ("First Amendment coverage of commercial speech is designed to safeguard" society's "interest[] in broad access to complete and accurate commercial information"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 432 (1993) (Blackmun, J., concurring) ("[T]his Court's emphasis [is] on the First Amendment interests of the listener in the commercial speech context."); *Va. State Bd. of Pharmacy*, 425 U.S. at 756 (the First Amendment's protection of commercial speech "is a protection enjoyed by ... recipients of the information"); Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 14 (2000) (noting that the Court has "focused its analysis on the need to receive information, rather than on the rights of speakers.").

thus restricts giving consumers information about the prices they pay on everyday goods and services.

This Court has been particularly solicitous of the free flow of truthful price information—that is, the public's right "to know who is charging what." *Va. State Bd. of Pharmacy*, 425 U.S. at 765. In *Virginia State Board of Pharmacy*, for example, the Court struck down a ban on advertising the prices of prescription drugs. "[T]he particular consumer's interest in the free flow of commercial information," the Court wrote, "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 770.[3]

By depriving the public of information, the no-surcharge law imposes a severe economic cost. When merchants are denied the ability to designate additional prices as "surcharges," the only way they can pass the cost of swipe fees on to consumers is by raising prices across the board. *See* Levitin, *Priceless?*, 45 Harv. J. on Legis. at 17, 27-28.[4] The impact on consumers is enormous. Merchants in the United States

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[3] *See also 44 Liquormart*, 517 U.S. 484 (price of alcoholic beverages); *Bates*, 433 U.S. 350 (price of lawyer services); *Carey v. Population Svcs. Int'l*, 431 U.S. 678 (1977) (availability and price of contraceptives).

[4] Theoretically, merchants could achieve the economic equivalent of a surcharge by raising base prices and offering a discount to non-credit users. Levitin, *Priceless?*, 45 Harv. J. on Legis. at 18, 19. In practice, that does not happen. The reason is that "consumers react very differently to surcharges and discounts." *Id.* at 19; *see also id.* at 2. Because of a well-known cognitive bias, "people have stronger reactions to losses and penalties than to gains." *Id.* at 19. Consumers thus "react more strongly to surcharges (perceived as penalties) than to discounts

rack up more than *$50 billion* in swipe fees each year, most of which are passed on to the public in the form of higher prices. *See id.* at 2. The effects of New York's no-surcharge law are thus farther reaching than the price-advertising ban in *Virginia State Board of Pharmacy*. There, the ban only affected the price of prescription drugs. *See* 425 U.S. at 754 & n.11, 765 n.20 (Virginia's ban on price advertising cost consumers millions of dollars every year). Here, the ban affects *every* kind of good or service that that can be purchased with a credit card.

Moreover, this vast transfer of wealth is highly regressive. Levitin, *Priceless?*, 45 Harv. J. on Legis. at 35-36. It is more affluent consumers who typically pay with credit cards, and those consumers at least get some of the fees back in the form of cash refunds, airline miles, and other rewards-program benefits. *See id.* at 15-16, 34-36. Those who pay with cash, check, or food stamps—disproportionately the poor—do not. *Id.* at 34-36. Thanks to the no-surcharge law, the poor thus pay for the credit-card fees and the perks of the wealthy. *See Va. State Bd. of Pharmacy*, 425 U.S. at 763 ("Those whom the suppression of prescription drug price information hits the hardest are the poor ... ."); *Bates*, 433 U.S. at 398 (noting that "low- and middle-income citizens" have a hard time "finding counsel willing to serve at reasonable prices."). In the worst case, "frequent flier miles are subsidized by food

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(perceived as serendipitous gains)" despite the economic equivalence of the two concepts. *Id.* Moreover, "[c]ash discounts do not have the full signaling effects of credit surcharges," which "alert the consumer to the extra cost of different payment systems." *Id.* at 21.

stamp recipients." Levitin, *Priceless?*, 45 Harv. J. on Legis. at 36.

And the law does not just impact individual consumers; it imposes a societal cost as well. Commercial speech—and particularly price information—is "indispensable to the proper allocation of resources in a free enterprise system," helping to ensure that the "numerous private economic decisions" making up the economy, "in the aggregate, [are] intelligent and well informed." *Va. State Bd. of Pharmacy*, 425 U.S. at 765. When laws hide price information from consumers, that system quickly breaks down. The law struck down in *Virginia State Board of Pharmacy*, for example, "insulate[d]" pharmacists "from price competition" and "open[ed] the way for [them] to make a substantial, and perhaps even excessive, profit in addition to providing an inferior service." *Id.* at 769. As a result, drug prices varied widely from location to location, even in the same area. *Id.* at 754 & n.11, 765 n.20.

New York's no-surcharge law has a comparable effect on the market. Because the cost of credit is hidden from consumers, there is no competition among credit-card companies to offer lower swipe fees. *See* Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 288-89 (2006). Consumers do not choose which credit card to use based on the swipe fee charged, and they use credit cards even when less-expensive alternatives like cash, checks, and debit cards are available. *See id.* at 272-74. The upshot of this lack of competition is that swipe fees in the United States are among the highest in the world. Bradford & Hayashi, Fed. Reserve Bank of

Kansas City, *Developments in Interchange Fees in the United States and Abroad* 1 (Apr. 2008). "[T]he efficient allocation of resources depends upon informed consumer choices." *Friedman v. Rogers*, 440 U.S. 1, 8-9 (1979). The no-surcharge law deprives consumers of those choices.

B. The state's claimed reasons for adopting the surcharge ban are unrelated to preventing false or misleading speech or otherwise protecting consumers. On the contrary, the law prohibits merchants from *truthfully* disclosing the cost of credit. "Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth." *44 Liquormart*, 517 U.S. at 503 (opinion of Stevens, J.). That is true here.

New York contended below that the no-surcharge law is necessary because labeling the price difference between cash and credit as a credit-card surcharge instead of as a cash discount will "make consumers unhappy." NY CA2 Br. 9. "[C]ustomers view such surcharges as unjustified penalties," the state argued, and the resulting "consumer anger" could "dampen retail sales." *Id.* But surely customers would also be angry if they learned they are *already* effectively paying surcharges in the form of higher base prices. Hiding that ugly truth from consumers to make them happy—and keep them shopping—is the purest form of paternalism.

This Court has "rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to

prevent members of the public from making bad decisions with the information." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002). A state thus may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Va. State Bd. of Pharmacy*, 425 U.S. at 773. For example, the state in *Virginia State Board of Pharmacy*, like the state here, argued that lifting the ban on price advertising would adversely affect consumers' shopping habits—in that case, by causing them to "choose the low-cost, low-quality service" and thus "drive the 'professional' pharmacist out of business." *Id.* at 769. Those fears, however, did not justify "keeping the public in ignorance." *Id.* at 770. As the Court explained:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Id.; *see also Bigelow v. Virginia*, 421 U.S. 809, 827-28 (1975) (state interest in "shielding its citizens from information" about lawful activities "entitled to little, if any, weight").

New York's decision to shield consumers from information about the cost of credit similarly denies them the ability to "perceive their own best interests." *Va. State Bd. of Pharmacy*, 425 U.S. at 770. As consumer advocates have long argued, if consumers knew about the costs of using credit they might choose to

avoid those costs by using less-expensive payment methods. *See Cash Discount Act, 1981: Hearings on S. 414 Before the S. Banking Comm.*, 97th Cong. 92 (1981) (testimony of Jim Boyle for Consumer Federation of America) (requiring merchants to disclose surcharges would "help consumers to make informed judgments about whether to buy with cash or with credit"). That, in turn, would drive competition to lower swipe fees, leading to lower prices and—in the long run—happier consumers. *See* Merchant, *Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee Regulation in the Wake of Landmark Industry Changes*, 68 Okla. L. Rev. 327, 370 (2016).

New York also argued below that the no-surcharge law was justified because "sellers can and often will use surcharges to extract windfall profits, thus reaping payments out of proportion to the value of the goods or services they provide." NY CA2 Br. 6. But the market can ordinarily be trusted to keep prices in check. Merchants who unnecessarily raise prices do not make windfall profits—they lose business.

Even if merchants could somehow get away with imposing higher fees than necessary, that is no reason to require merchants to bundle the fees into their base prices rather than disclosing them as a "surcharge." Doing so does not stop merchants from imposing extra fees; it just hides those fees from consumers. Indeed, it is the resulting lack of price competition that allows credit-card companies to get away with *already* making billions of dollars in windfall profits every year. *See* Levitin, *Priceless?*, 45 Harv. J. on Legis. at 2, 27.

The state's justification closely resembles the one this Court condemned in *Rubin v. Coors Brewing Co.*,

514 U.S. 476 (1995). There, the federal government argued that banning alcohol-content information on beer bottles was necessary to prevent escalating alcohol content. *Id.* at 479. The Court held the law unconstitutional because the government could have accomplished its stated goal by "directly limiting the alcohol content of beers" rather than by restricting speech. *Id.* at 490-91. Here, New York argues that banning disclosure of surcharges is necessary to prevent escalation of those charges. As in *Rubin*, the state could have accomplished that goal without restricting speech, in this case by directly limiting the amount merchants can impose as a surcharge. Australia, for example, adopted just such a limit after surcharges were legalized in that country. *See* Levitin, *Priceless?*, 45 Harv. J. on Legis. at 51-52.

The state did make one consumer-protection argument in favor of the law below, contending that surcharges "make it easier for sellers to advertise a low regular price and then impose surprise credit-card fees at the point of sale." NY CA2 Br. at 9-10. That hypothetical practice would indeed be misleading, but it has nothing to do with the no-surcharge law. Unscrupulous merchants can charge more than their advertised prices with or without the law, and, either way, doing so would surely violate New York's false-advertising statutes. *See* N.Y. Gen. Bus. Law §§ 350 & 350-a.

In any event, the possibility that merchants *might* use surcharges in a misleading way does not justify the ban. A state "may not place an absolute prohibition on certain types of potentially misleading information ... if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S.

191, 203 (1982). Here, rather than forcing merchants to *conceal* surcharges from consumers, the state could address the risk of false advertising by requiring merchants to *disclose* them in advertisements, as at least one state already does. *See* Minn. Stat. § 325G.051(1)-(a). That was the alternative that the Federal Reserve Board, the Federal Trade Commission, and consumer groups recommended to Congress when it considered the federal no-surcharge law. *See Cash Discount Act Hearings* at 10 (Testimony of Nancy Teeters, Federal Reserve Board) ("[R]ecommend[ing] for subcommittee consideration a very simple rule: ... that the availability of the discount or surcharge be disclosed to consumers."); *id.* at 91, 126-27.

New York's various justifications aside, the real reason for the no-surcharge law is probably one that the state never acknowledges. It seems likely that the law was designed to benefit—at the expense of consumers—the credit-card companies that lobbied for its passage. As one consumer advocate told Congress during consideration of the federal no-surcharge law, the "ban constitutes special interest legislation that serves the interest of only one special interest group, the credit card industry." *See id.* at 97 (testimony of Ellen Broadman for Consumers Union). And "[n]ot only that, but it serves this one special interest group at the expense of the American public, to the tune of billions of dollars each year." *Id.*; *see also id.* at 91 (testimony of Jim Boyle for Consumer Federation of America) ("The surcharge ban is special interest legislation advocated by groups who push the overutilization of credit cards"). That explains why it was only industry groups that supported the law, while consumer groups uniformly opposed it. *See, e.g., id.*

C. Worst of all from a First Amendment perspective is the way the law insulates itself from public scrutiny and challenge. Just as commercial speech is "indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Va. State Bd. of Pharmacy*, 425 U.S. at 765. But when a state restricts commercial speech in pursuit of policy goals unrelated to protecting consumers, "a ban on speech could screen from public view the underlying governmental policy." *Cent. Hudson*, 447 U.S. at 566 n.9; *see also* Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. at 11. If, for example, the government were to ban advertising the price of health-care plans, it might also hide fundamental problems with the health-care system and thus discourage needed reforms. *See id.*

So too here. Because of the surcharge ban, most consumers are unknowingly paying higher prices for goods and services while believing—wrongly—that credit cards are free. *See* Merchant, *Merchant Restraints*, 68 Okla. L. Rev. at 327. As long as people do not know that they are paying banks and credit-card companies for everyday goods and services, no pressure can be brought to bear to change that system. And because the no-surcharge law hides its effects from the public, the law itself is shielded from scrutiny. By "obscur[ing] [the] underlying government policy," the law thus "not only hinder[s] consumer choice, but also impede[s] debate over central issues of public policy." *44 Liquormart*, 517 U.S. at 503 (opinion of Stevens, J.) (internal quotation marks omitted).

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"The First Amendment directs [courts] to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Thompson*, 535 U.S. at 375. New York's no-surcharge law is just such a regulation—a classic example of an unjustified and unconstitutional restriction on commercial speech.

II. This Court Should Evaluate the Law Under Intermediate Scrutiny.

Because this is a classic commercial-speech case, intermediate scrutiny under *Central Hudson* is the proper test. But two recent decisions by this Court, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), have created confusion among courts and commentators about the continuing validity of that test. Relying on those cases, other amici for petitioner invite the Court to use this case as an opportunity to definitively cast aside *Central Hudson*. Because New York's law is a "content-based" restriction on speech, they argue, the much tougher strict-scrutiny standard should instead apply. *See* Albertson's, et al. Br. on Pet. at 20-23; *see also* Cato Inst. Br. on Pet. at 8-10. The Court should decline amici's invitation, both because there is no need to reach the issue in this case and because there are good reasons to retain the intermediate-scrutiny test.

A. In *Sorrell*, this Court held unconstitutional a Vermont law that restricted the sale and use of pharmacy records. 564 U.S. at 557. The Court concluded that the law imposed a "speaker- and content-based burden on protected expression." *Id.* at 571. "In the

ordinary case," the Court wrote, "it is all but dispositive to conclude that a law is content-based," and "[c]ommercial speech is no exception." *Id.* at 566, 571. But rather than basing its holding on the speaker- and content-based nature of the rule, the Court declined to decide the standard of scrutiny because the result would have been "the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny" applied. *Id.* at 571. The decision led some to conclude that the Court intended to replace, or signal its readiness to replace, *Central Hudson*.[5]

And in *Reed*, the Court again emphasized that content-based speech restrictions are subject to strict scrutiny, without expressly exempting commercial speech from that rule. 135 S. Ct. 2218. Following *Reed*, litigants, including amici here, have argued that the Court intended to require strict scrutiny for *all* content-based restrictions on speech, commercial or otherwise. *See* Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 Harv. L. Rev. 1981, 1986-87 (2016).

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[5] The Ninth Circuit, for example, concluded that *Sorrell* "modified the *Central Hudson* test for laws burdening commercial speech," requiring something more than intermediate scrutiny when the restriction is content- or speaker-based. *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 648 (9th Cir. 2016), *reh'g granted*, *Retail Digital Network, LLC v. Gorsuch*, 2016 WL 6790810 (9th Cir. Nov. 16, 2016); *see also, e.g.*, *Sorrell*, 564 U.S. at 588 (Breyer, J., dissenting) (noting that the decision "suggest[s] a standard yet stricter than *Central Hudson*"); *United States v. Caronia*, 703 F.3d 149, 164 (2d Cir. 2012) (concluding that *Sorrell* required a "two-step analysis" but "did not decide the level of heightened scrutiny to be applied"); Thomson, *Whither Central Hudson? Commercial Speech in the Wake of Sorrell v. IMS Health*, 47 Colum. J.L. & Soc. Probs. 171, 173 (2013).

Amici's argument, if adopted, would effectively mean the end of the commercial-speech doctrine. As Justice Breyer pointed out in his dissent to *Sorrell*, "[r]egulatory programs necessarily draw distinctions on the basis of content," and commonly "affect[] only a class of entities, namely, the regulated firms." 564 U.S. at 589. Thus, most of this Court's past commercial-speech cases have involved laws that were both content- and speaker-based. *See, e.g.*, *Thompson*, 535 U.S. at 364-65 (prohibition on advertising compounded drugs by doctors and pharmacists); *44 Liquormart*, 517 U.S. at 489-90 (prohibition on advertising the price of alcoholic beverages by alcohol vendors and news media); *Edenfield*, 507 U.S. at 770 (prohibition on soliciting business by accountants); *Va. State Bd. of Pharmacy*, 425 U.S. at 749-50 (prohibition on advertising the price of drugs by pharmacists). Yet, the Court did not apply strict scrutiny.

In any case, there is no need for this Court to decide the question here. The Court "do[es] not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999). Such a narrow ground is readily available in this case because "*Central Hudson* ... provides an adequate basis for decision." *Id.* Moreover, as New York has acknowledged, "few if any additional state laws are likely to be affected" by the Court's resolution of the question presented here." BIO 15.

This Court has expressed doubts about the continuing validity of *Central Hudson* before. Since its inception, this Court's commercial-speech test has faced criticism for not being strict enough. *See, e.g., Cent.*

Hudson, 447 U.S. at 573-75 (Blackmun, J., concurring). But the Court in the past has always been able to resolve cases like this one without resorting to a new, stricter form of scrutiny. *See Discovery Network*, 507 U.S. at 416 n.11 ("Because we conclude that Cincinnati's ban on commercial newsracks cannot withstand scrutiny under *Central Hudson* ..., we need not decide whether that policy should be subjected to more exacting review.").[6] That alone is reason enough to do the same here. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("[E]ven in constitutional cases," stare decisis "carries such persuasive force" that the Court has "always required a departure from precedent to be supported by some special justification.").

B. If the Court does reach the question, however, it should reaffirm intermediate scrutiny and the *Central Hudson* test. For more than thirty-five years, *Central Hudson* has been the applicable First Amendment standard for restrictions on commercial speech. In that time, the test has proved itself well suited to root out and repudiate government restrictions on speech that are unrelated to protecting consumers. That this Court has upheld only a handful of restraints under *Central Hudson* belies amici's concern that the test does not adequately protect First Amendment values.

Central Hudson is itself a form of heightened scrutiny. "The *Central Hudson* test is significantly stricter than the rational basis test, ... requiring the Govern-

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[6] *See also, e.g.*, *Sorrell*, 564 U.S. at 571; *Thompson*, 535 U.S. at 367-68; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001); *Greater New Orleans Broad. Ass'n*, 527 U.S. at 184.

ment not only to identify specifically a substantial interest to be achieved by the restriction on commercial speech, but also to prove that the regulation directly advances that interest and is not more extensive than is necessary to serve that interest." *Thompson*, 535 U.S. at 374 (internal quotation marks and citations omitted). The state's burden is a "heavy" one, *44 Liquormart*, 517 U.S. at 516, requiring actual evidence—not just "speculation or conjecture"—that each part of the test is satisfied, *Edenfield*, 507 U.S. at 770. Restraints imposed to keep consumers in the dark or to manipulate consumer choice cannot pass that test, and such restraints therefore "rarely survive constitutional review." *44 Liquormart*, 517 U.S. at 504.[7]

At the same time, this Court has also "always been careful to distinguish commercial speech from speech"—like political expression—"at the First Amendment's core." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). This "common-sense distinction" between commercial and noncommercial speech stems from commercial speech's "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) (internal quotation marks omitted). "[R]estrictions on commercial speech do not often repress individual self-expression" and "rarely interfere with the functioning of democratic political processes." *Thompson*, 535 U.S. at 388 (Breyer, J., dissenting). Commercial

[7] The one exception is *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), where an advertising ban was imposed to suppress demand for casino gambling by residents of Puerto Rico. But in separate opinions, all nine justices in *44 Liquormart* agreed that *Posadas* is no longer good law. 517 U.S. at 509-14 (opinion of Stevens, J.).

speech is also typically more robust than other forms of expression—given the profit motive, "there is little likelihood of its being chilled by proper regulation and forgone entirely." *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24. For those reasons, this Court "has concluded that, from a constitutional perspective, commercial speech does not warrant application of the Court's strictest speech-protective tests." *Thompson*, 535 U.S. at 388 (Breyer, J., dissenting).

Moreover, commercial speech "occurs in an area traditionally subject to government regulation." *Ohralik*, 436 U.S. at 455-56. And the state has an important interest in protecting the public from "commercial harms" in that area. *Discovery Network*, 507 U.S. at 426. Commercial-speech restrictions "often reflect a democratically determined governmental decision to regulate a commercial venture in order to protect, for example, the consumer, the public health, individual safety, or the environment." *Thompson*, 535 U.S. at 388 (Breyer, J., dissenting).

The intermediate-scrutiny test therefore recognizes that government has a legitimate need to regulate the communicative aspects of commercial transactions to protect consumers. *Va. State Bd. of Pharmacy*, 425 U.S. at 771-72 ("The First Amendment ... does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."). The test gives governments more leeway to enact commercial regulations that affect speech, "allow[ing] modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik*, 436 U.S. at 456. In the commercial-speech context, it is thus "appropriate to require that a commercial message appear in such a form, or include

such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24. And even blanket prohibitions of speech are sometimes permissible, when those restrictions are narrowly tailored to protect consumers from false, misleading, overreaching, or privacy-invading forms of advertising. *See Went For It*, 515 U.S. 618; *Friedman*, 440 U.S. 1; *Ohralik*, 436 U.S. 447.

Under strict scrutiny, on the other hand, restrictions on speech are sustained "only in the most extraordinary circumstances." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983). "[I]t is the rare case in which a State" can satisfy that test by "demonstrat[ing] that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. The Florida Bar*, 135 S. Ct. 1656, 1665-66 (2015). Applying strict scrutiny's "exacting" standard, *id.* at 1664, to commercial-speech restrictions would call into question a wide range of consumer-protection laws whose constitutionality has thus far been unquestioned. *See Reed*, 135 S. Ct. at 2235 (Breyer, J., concurring) (noting the wide range of content-based laws, from securities regulation to "signs at petting zoos," that would be imperiled under strict scrutiny); Shanor, *The New Lochner*, 2016 Wis. L. Rev. at 173-74. That would risk returning the Court "to the bygone era of *Lochner v. New York*, 198 U.S. 45 (1905), in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies." *Sorrell*, 564 U.S. at 585 (Breyer, J., dissenting) (internal quotation marks omitted); *see generally* Shanor, *The New Lochner*, 2016 Wis. L. Rev. 133.

Applying strict scrutiny to commercial-speech restrictions would have an additional consequence. "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U.S. at 456. To avoid striking down many common economic regulations, strict scrutiny would have to be weakened. And that would mean less constitutional protection for core First Amendment speech.

In short, *Central Hudson* has worked well because it places a heavy, but not insurmountable, burden on government to demonstrate that its interest in protecting consumers from fraud, deception, or overreaching is substantial and that it has tailored its speech restraints as narrowly as possible. "[S]ome such approach is necessary if the First Amendment is to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrants neither near-automatic condemnation (as 'strict scrutiny' implies) nor near-automatic approval (as is implicit in 'rational basis' review)." *United States v. Alvarez*, 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring).

CONCLUSION

This Court should reverse the judgment of the court of appeals under an intermediate standard of scrutiny.

Respectfully submitted,

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